No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

EDWARD CHRISTENSEN, *et al.*,

*Petitioners,*

*vs.*

HARRIS COUNTY, TEXAS, *et al.*,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Section 207(o) of the Fair Labor Standards Act[1], as amended, 29 U.S.C. § 201 *et seq.*, ("FLSA") defines the circumstances under which a public employer is permitted to deviate from the basic rule that employees required by their employer to work overtime must be paid in cash at time and a half the regular rate of pay. Under that section, a public employer may provide compensatory time in lieu of cash overtime when the compensatory time meets specific conditions.

The question presented here is whether under 1985 compensatory time amendments to the FLSA, 29 U.S.C. § 207(o), its implementing regulations, 29 C.F.R. §§ 553.20-553.28, and the Secretary of Labor's considered interpretations and rulings thereon, a local governmental entity which utilizes a system of accrued compensatory time in lieu of cash for overtime hours may, absent an agreement with the employer permitting such compulsion, compel employees to utilize or burn their accumulated compensatory time involuntarily, that is, when they do not request it?

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1. 9 U.S.C. § 207(o) (West 1985).

## PARTIES TO THE PROCEEDING

In addition to Petitioner Edward A. Christensen, the following are members of the Harris County Sheriff's Department and are also Petitioners. They have been parties to the action since its inception. For convenience, they are referred to as "the Deputies."[2]

1. Edward A. Christensen
2. Kenneth O. Adams
3. David W. Addison
4. Jose A. Alvarado
5. Robert Amboree
6. Bobby G. Andrews
7. Randy Anderwald
8. Gary R. Ashford
9. Craig L. Bailey
10. Richard Bailey
11. Ricardo E. Baldoras
12. Herbert V. Barnard
13. Gerald Barnett
14. Paulette M. Barnett
15. Bridgett Blackman
16. Aynl E. Blackwell
17. Gary F. Blahuta
18. Scott P. Blakenburg
19. Deborah Bliess
20. Bruce H. Breckenridge
21. J.T. Brooks
22. Brian Buchannan
23. Patricia M. Bui
24. Don E. Bynum
25. Clarence A. Callis
26. William M. Campbell
27. Heather Carr
28. Thomas J. Carr
29. Paul E. Carpenter
30. Robert Casey
31. Mark E. Cervel
32. Eladio C. Chavez
33. Roy Clark
34. Denny P. Coker
35. Alford A. Cook
36. Gregory P. Cox
37. Donald D. Crayton
38. Richard D. Crook
39. David D. Davis
40. Gary W. Davis
41. Christopher E. Denny
42. Russell Duckes
43. Larry A. Eickhoff
44. Frank Fairly
45. David W. Finley
46. James P. Fitzgerald

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2. Lynwood Moreau, the initial lead Plaintiff, asserted individual claims which are not before this Court because he has withdrawn. *See*, Order granting Moreau's Motion to Withdraw Authorization of Counsel to Represent Him. (Docket #37-39) November 20, 1997.



47. Ernie R. Fowler
48. Michael R. Garcia
49. Thomas M. Gentry
50. John Goldejohn
51. Robert M. Goerlitz
52. David Gonzales
53. Raul Gonzales
54. Miguel A. Gonzales
55. Billy Gray
56. William L. Gray
57. Lawrence P. Gries
58. Thomas P. Gurrey
59. Preston R. Halfin
60. Sammy Head
61. Neal Hines
62. Larry A. Howell
63. Marshall P. Isom
64. James A. Johnson
65. Derry L. Jones
66. David E. Kaup
67. William C. Kinisell
68. Howard J. Kimile
69. Steve Kirls
70. Edgar Knighton
71. Freddy G. Lafurente
72. Michael G. Lagrove
73. Al Lanford
74. Vernon S. Lemons
75. Shemei B. Levi
76. Jeanne Long
77. Timothy Loyd
78. Joe S. Magallou
79. David B. Martin
80. Pedro Martinez
81. Russell L. Mayfield
82. Terry McGregor
83. Robert C. Meaux
84. Stephen Melinder
85. Marty M. Mirgo
86. D.D. Montgomery
87. Jose L. Merin
88. Richard O. Newby
89. Arthur W. Nolley
90. William R. Norwood
91. Richard C. Nummery
92. Karen D. O'Bannon
93. Raymond E. O'Bannon
94. Guadalupe Palafox
95. Wayne Parinella
96. Deborah Petruska
97. James A. Phillips
98. Simon C. Ramirez
99. Michael B. Rankin
100. James C. Reynolds
101. Willard G. Rogers
102. Gerald M. Robinson
103. Joe Ruffino
104. Lance J. Scott
105. Rob A. Self
106. Donald Shaver
107. James K. Shirley
108. James Smedick
109. Ginn K. Spriggs
110. Grahmann
111. Jeffrey M. Stauber
112. Larry L. Strickland
113. Billy J. Taylor
114. Kerry Townsend
115. Richard S. Trinski
116. Gordon Trott

117. Ed Trott
118. Richard P. Valdez
119. Dalton E. Van Slyke
120. Frank L. Vernagallo
121. Ruben Villarreal
122. Johnny F. Walling
123. Gerald R. Warren
124. James M. Watson
125. Thomas G. Welch
126. John A. Wheler
127. Joseph L. Williams
128. Rwanda Wiltz

The Respondents are Harris County, Texas and Tommy B. Thomas, Sheriff, Harris County, Texas[3]

3. Johnny Klevanhagen, former Sheriff of Harris County, was not a party to the appeal from the judgment of the Trial Court.



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**APPENDIX**

*Appendix*





Edward Christensen and 128 other individually named Harris County deputy sheriffs, Plaintiffs in the District Court and the Appellees in the Court of Appeals, hereby petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Lynwood Moreau, et al. v. Harris County, Texas, et al.*, Fifth Circuit No. 97-20796 (October 19, 1998).

## OPINIONS BELOW

The Court of Appeals opinion is reported at 158 F.3d 241 (5th Cir. 1998) and is reproduced as Appendix A (Pet. App. 1a-23a) in the separately bound Appendix to this *certiorari* petition (hereafter "Pet. App.").

The District Court's opinion on Summary Judgment was issued on November 25, 1996, reported at 945 F. Supp. 1067 (S.D. Tex. 1996), and is reproduced as Appendix B. (Pet. App. 24a-27a). The District Court's final order is unreported and is reproduced as Appendix C. (Pet. App. 28a).

## JURISDICTIONAL STATEMENT

The Court of Appeal's Opinion and Judgment were entered on October 19, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). No petition for rehearing or hearing *en banc* was filed.

## STATUTES AND REGULATIONS INVOLVED

This case involves the construction of the 1985 Amendments to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* (FLSA), codified in 29 U.S.C. § 207(o) and the relevant implementing regulations thereto, codified in 29 C.F.R. §§ 553.20-553.28.

The 1985 Amendment to Section 7 of the FLSA is reproduced in Appendix E. (Pet. App. 32a-38a). The implementing regulations to the FLSA, promulgated by the Secretary of Labor are reproduced in Appendix F. (Pet. App. 39a-59a).

## STATEMENT OF THE CASE

This case presents the question of whether public sector compensatory time under the 1985 Amendments to the Fair Labor Standards Act, 29 U.S.C. § 207(o), its implementing regulations, 29 C.F.R. §§ 553.20-553.28, and the Secretary of Labor's considered interpretations and rulings thereon, a local governmental entity which utilizes a system of accrued compensatory time in lieu of cash for overtime hours may, absent an agreement with the employees permitting mandatory time off, compel employees to utilize or burn their accumulated compensatory time bank involuntarily, that is, when they do not request it?

The Fifth Circuit has answered this question in the affirmative, expressly disagreeing with the Eighth Circuit holding in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert. denied sub nom. Schrirou v. Heaton*, 515 U.S. 1104 (1995) to the contrary. The court below consciously and intentionally created a conflict among the circuits.

> This case squarely presents the *Heaton* issue, and we must thus decide whether to extend [the Fifth Circuit's own previous FLSA compensatory time case] *Alford v. State of Louisiana*, 145 F.3d 280 (5th Cir. 1998) or to follow *Heaton*. We choose to extend *Alford*. The lack of uniformity occasioned by our decision to deviate from the Eighth Circuit is not a substantial concern in this context. (Pet. App. 10a-12a.)



The conflict also reflected an internal disagreement within the Fifth Circuit. Judge Dennis dissented on the basis of this Court's rule that

> because the statute is silent or ambiguous with respect to a specific issue, the question for this court is whether the administrative agency has addressed the issue, and, if so, whether the agency's answer is based on a permissible construction of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), *see also, Auer v. Robbins*, 117 S. Ct. 905, 909 (1997).

(Pet. App. 14a-15a).

The tripartite dispute concerns whether the issue in this case should be decided on the basis of —

> (1) the Eighth Circuit's *Heaton* statutory construction rule — "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode," *Heaton*, 43 F.3d at 1180 — that compensatory time paid in lieu of, and as a restricted substitute for, the standard statutory requirement of cash overtime is a bank-like account which belongs to the employee under statutory limits controlling its **preservation and use** which prevent an employer from unilaterally compelling the use of compensatory time off contrary to the employees' preference; or
>
> (2) the majority Fifth Circuit's statutory construction "default rule" in this case —
>
> > our holding here and in *Alford* is thus merely an application of the general

> principal that the employer can set work place rules in absence of a negotiated agreement to the contrary.

(Pet. App. 13a); or

(3) dissenting Judge Dennis' articulation of this Court's rule in *Auer v. Robbins*, 519 U.S. 452 (1997) — it is the Secretary of Labor, and not the courts, that is charged with the issuance of regulations under the 1985 Amendment Act, P.L. 99-150, 56 (1985), and because the rules controlling FLSA compensatory time are

> a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling, unless plainly erroneous or inconsistent with the regulations. *Auer*, 519 U.S. at 456.

(Pet. App. 14a-23a).

## THE PROCEDURAL HISTORY OF THIS CASE

On April 28, 1994, Petitioners ("Deputies"), consisting of 129 Deputy Sheriffs employed by Respondents ("County"), initiated this action in the United States District Court for the Southern District of Texas.[4] In their action, the Deputies contended that the County engaged in two practices which contravened the provisions of Section 7(o) of the FLSA and the Secretary of Labor's implementing regulations to that statute. In particular, the County failed and refused to grant the

4. Deputy Moreau was the initial lead plaintiff but is not a petitioner.



Deputies the use of their accumulated compensatory time when they reasonably requested and unilaterally forced them to use their accumulated compensatory time off when they did not request its use.

The Trial Court, after examining the Deputies claims required the parties to submit a stipulated set of facts addressing the County's practice of compelling Deputies to use their accumulated compensatory time. (Pet. App. 29a-31a). Correspondingly the Trial Court directed the parties to file cross motions for summary judgment based upon their stipulation of facts.

In response to the Trial Court's directive, the parties stipulated to the following facts:

> Harris County personnel regulations provide for the payment of compensatory time off for its employees in accordance with the Fair Labor Standards Act. It is the policy of the Harris County Sheriff's Department that the compensatory time of employees, who, for purposes of the Fair Labor Standards Act are considered non-exempt will be maintained below predetermined maximum levels. Pursuant to this policy, each Bureau Commander determines the maximum number of compensatory hours that may be maintained by the employees in his or her bureau. Such determination is based upon an assessment of the personnel requirements of the particular bureau. Whenever it appears that the employee has accumulated compensatory hours which approach the maximum allowable number of compensatory hours authorized by the Fair Labor Standards Act, the employee is advised that he or she is nearing the maximum number and is requested

to voluntarily take steps to reduce the accumulated compensatory hours. If the employee does not voluntarily take steps to reduce the accumulated hours within a reasonable time, the employee's supervisor is authorized to order the employee to reduce the accumulated compensatory time. While the Department attempts to arrange mutually agreeable times for the employee to utilize his or her accumulated compensatory time, an agreement cannot always be reached between the employer and supervisor. In that event, the supervisory personnel are authorized by the Department to issue an order directing the employee to utilize compensatory time at a time or times that will best serve the personnel requirements of the bureau. If the employee is dissatisfied with the supervisor's order, he or she may complain to higher levels of supervision with the department on an informal basis. (Pet. App. 29a-31a).

Based upon these stipulations, the parties filed their cross motions for summary judgment. On November 25, 1996, the Trial Court, addressing these motions, entered an opinion on summary judgment, holding that the County's practice of forcing employees to use their accumulated compensatory time when they did not request it violated the provisions of Section 7(o) of the FLSA, 29 U.S.C. § 207(o). *Moreau v. Harris County*, 945 F. Supp. 1067 (S.D. Tex. 1996). (Pet. App. 24a-27a). Relying on the decision of the Eighth Circuit in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert. denied sub nom. Schriro v. Heaton*, 515 U.S. 1104 (1995), the Trial Court found:

> Public employers may pay their employees for overtime by awarding time off at the rate of one and one-half hours for each hour, 29 U.S.C. § 207(o)(1992). Governments are allowed to substitute time off for cash as compensation; but the time credits need to be as nearly equivalent to cash as possible; the time off must be consumable by the worker on the worker's terms. *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert. denied sub nom. Schriro v. Heaton*, 515 U.S. 1104 (1995).
>
> Federal law limits maximum accrued time to 240 or 480 hours depending on the type of work an employee does. Employees must be paid cash for additional hours. The workers in this case have not yet accrued 240 hours. The function of the county limits is to force workers to take time off rather than to keep working and receive cash for overtime.

945 F. Supp. 1067. (Pet. App. 25a).

On July 28, 1997, the Trial Court entered a final judgment prescribing the County's practice of unilaterally forcing petitioners to consume their accumulated compensatory time. (Pet. App. 28a).

The County appealed this judgment to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit reversed. *Moreau v. Harris County*, 158 F.3d 241 (5th Cir. 1998). (Pet. App. 1a-23a). The Fifth Circuit's Judgment was entered on October 19, 1998.

The Deputies, complaining of this decision and judgment, respectfully request that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review that Court's holding and resolve the issues surrounding the preservation of FLSA compensatory time consistently with the applicable rules and interpretations of the Department of

Labor. The question is one which is the subject of a clear, direct and severe conflict between the circuits undermining national uniformity with regard to enforcement of the FLSA overtime requirements, as well as one in which, the decision of the Fifth Circuit decided a federal question inconsistently with the applicable federal statute and related regulations and contrary to this Court's rule in *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905 (1997), that questions concerning a court's application of the Fair Labor Standards Act are controlled by the considered judgment of the Secretary of Labor concerning the application of her own regulations.

## REASONS FOR GRANTING THE WRIT

This case presents a question of federal law on which the Circuit Courts of Appeal are diametrically divided — Does 1985's public sector exception from the FLSA's requirement that overtime be paid in cash rather than compensatory time off, generate compensatory time banks from which an employer may unilaterally withdraw time by scheduling mandatory time off, as the Eighth Circuit ruled below in this case? Or, do the compensatory time banks, developed as a substitute for an employee's entitlement to cash overtime, belong to the employee in the sense that they may be accessed only at the employee's request and may not be diminished unilaterally by the employer through the use of mandatory time off, as the Eighth Circuit has ruled in *Heaton*?

The application of FLSA § 207(o) contained in the majority decision of the Fifth Circuit below is an erroneous application of federal law in that it violates this Court's rule as set forth in *Auer v. Robbins*, 519 U.S. 452 (1997), that a court's interpretation of the compensatory time off provision of § 207(o) is controlled by that of the Secretary of Labor. The decision of the Fifth Circuit is at odds with the Secretary's view.



## I.

## LEGISLATIVE AND REGULATORY BACKGROUND OF FLSA § 207(o) HIGHLIGHTS THE IMPORTANCE OF GRANTING THIS PETITION.

For forty-eight years compensatory time in lieu of cash payment for labor was anathema to the FLSA. For more than fifty years, timely cash payment for hours of work has been a fundamental premise of the Act. This is so because broadly used, liberally accessed, employer mandated compensatory time off in lieu of cash undermines the effectiveness of the national FLSA overtime standard.[5] The core purpose of the Act's premium pay for overtime is not the provision of an employee benefit; instead it is intended as a market disincentive to an employer so managing the work place to create fewer jobs with hours in excess of the forty hour per week standard rather than more jobs with hours within the standard.[6] Compensation

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5. 29 U.S.C. § 207(k) allows a work period in law enforcement of up to 171 hours in 28 days. That alternative schedule is applicable for Harris County Deputies. However, the traditional 40 hour per week standard remains the preferred as best short hand for referring to the national hours of work standard under the FLSA.

6. The job creation goal of the Act was highlighted by Justice Reed's 1941 opinion in *Overnight Motor Transport v. Missel*, 316 U.S. 572, 576 (1941):

> [The Court of Appeals] felt that one of the fundamental purposes of the Act was to induce work-sharing and relieve unemployment by reducing hours. We agree that the purpose of the Act was not limited to a scheme to raise substandard wages first by a minimum wage and then by increased pay for overtime work. Of course, this was one effect of the time and one half provision, but another and

(Cont'd)

systems which provide for payment for hours of work other than in cash avoid this disincentive and undermine the effectiveness of the national hours of work standard.[7] This is particularly so when an employer establishes a practice of moving compensation liability from one pay period to another through mandatory time off as a substitute for cash overtime.

(Cont'd)

> an intended effect was to require extra pay for overtime work by those covered by the act even though the hourly wages exceeded the statutory minimum. The provision of § 7(a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum wage. By this requirement although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours of the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was part of the plan from the beginning. . . . The message of November 15, 1937 calling for the enactment of this type of legislation referred again to protection from excessive hours. May 24, 1937, 81 Cong. Rec. 4983, 75th Cong. 1st Sess. Sen. Rep. No. 884 on S. 24754 (July 6, 1937), all spoke of maximum hours as a separate desirable object. Indeed the Act itself in setting up two sections of standards, § 7 for hours, emphasizes the duality of the Congressional purpose. 316 U.S. at 577-578. (emphasis added).

7. " 'A ceiling for hours' is just as much an independent objective of the Act as a 'floor for wages,' and surely it is a serious misreading of the Act to assume that Congress meant to discourage long hours of work only where the wages paid were close to the statutory minimum. Living conditions can be improved and work spread even where wages are comparatively high." "Stein Report" (October 10, 1940), *Wage and Hour Manual* (BNA), Cumulative Edition 1944-1945, at 679-680.



A mandatory time off system strikes the FLSA overtime standard a "double whammy" — the employer adjusts work schedules to get the job done with fewer workers; strike one. And then, the employer avoids contemporaneous premium pay cash liability; thus, strike two, defeating the cost of the time and one half incentive to spread the work among less expensive straight time workers.

In constructing the FLSA between 1936 and 1938, Senator Hugo Black, later Justice Black, and his New Deal colleagues, were insistent that pay be required in cash on the basis of a forty hour work week standard. The standard arose, in part, as a reform of the employment practices common in Senator Black's Alabama in the 1920's and 1930's, a period of job scarcity during which some of the Senator's constituents were often paid in script redeemable only at the employer's stores, rather than in cash, and were required to work very long work hours on days in which the company had extra work and go home on days in which work was slow. This employment system operated absent a national hours of work standard. It allowed industry to concentrate its work at low wages spread among fewer workers than would be the case under a standard forty hour work week with overtime at time and one-half.[8] The aim

8. *See*, the history of enactment of the FLSA in Roediger and Foner, *Our Own Time: A History of American Labor and the Working Day* (Greenwood Press, 1989); Hunnicutt, *Work Without End: Abandoning Shorter Hours for the Right to Work* (Temple University Press, 1988); Rosensweig, *Eight Hours for What We Will: Workers and Leisure in an Industrial City 1870-1920* (Cambridge University Press, 1983); Steinberg, *Wages and Hours: Labor Reform in the Twentieth Century* (Rutgers University Press, 1982); Cahill, *Shorter Hours: A Study Since the Civil War* (Columbia University Press, 1932); Nodland, "A Brief History of the FLSA," 39 *Labor Law Journal* 715-28 (November 1988); Hunnicutt, "Monsignor Ryan and the Shorter Hours of Labor," 69 *Catholic Historical Review* 384-401 (July 1983); and Eggert, "Fight for the Eight Hour Day," *American History Illustrated*, 36-44 (May 1972).

of the FLSA premium pay/hours of work standard was to create a market incentive to spread work. The use of employer mandated time off as overtime compensation in lieu of cash alleviates the market force of that incentive and, thereby, lessens its effectiveness. Thus, the Act outlawed mandatory time off as a substitute for cash pay at a time and one half premium for overtime.

As originally enacted in 1938, the FLSA applied only to private employers. Beginning in 1966, Congress expanded the coverage to protect state and local government employees which resulted in a now settled question of the authority of the Congress to do so. *See, e.g., Maryland v. Wirtz*, 392 U.S. 183 (1968); *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 328 (1985). That dispute was resolved in 1985 by *Garcia* with a recognition that under the federalism of the Tenth Amendment, Congress, and not the judiciary, is the proper institution to protect and give full consideration to federalism and the special attributes of state and local government, including particularly the special character of the public employer-public employee relationship.

In a direct response to these concerns, Congress amended the FLSA insofar as that Act applies to the public sector shortly after this Court's decision in *Garcia*. (P.L. 99-150; 99 Stat. 790). Congress enacted the 1985 Amendments after full consultation with both public employers and public employees in a process designed to ascertain and harmonize their basic interests and needs with a national hours of work standard which would include the public sector.[9]

9. *See, Hearings on the Fair Labor Standards Act*, H. Hrg. 99-67, 99th Cong. 1st Sess. (Sept. 24, 1995); and S. Hrg. 99-359, 99th Cong. 1st Sess. (July 25, August 28, and Sept. 10, 1995).



After the *Garcia* decision, many public employers and their organizations sought Congressional relief from the costs of FLSA coverage, arguing that such costs would seriously injure their ability to function effectively. In hearings held by House and Senate committees, public employees argued that compliance with *Garcia* would not be excessively costly, that it was only fair for public employees to enjoy the same standards as virtually all private employees, and that with the expansion of public employment to a much larger portion of the work force national wage and hours standards would be diluted were such a significant portion of American workers exempted.[10]

At the invitation of Congressional leaders, the public-employer and public-employee groups met and proposed legislation which was the product of intense negotiation between all the affected parties and a resulting extensive compromise.[11] With board support, including organizational

10. In the end, public employers and public employee representatives agreed in their testimony before Congress that use of compensatory time in lieu of overtime pay, if pursuant to equitable arrangements, could be mutually beneficial. *See*, e.g., House Hearings, 99th Cong., 1st Sess. 155 (1985) (G. Brazgel, IUPA Reg. Dir., representing the union of Deputies in their case) ("Comp time is vital to policing. Not only is it an important benefit to on the job police officers, but it also is an important tool of sound police management.")

11. *See, e.g.*, 131 Cong. Rec. S 14047 (Sen. Nickles) (the final Senate bill "is different from the bill I originally introduced and represents a compromise among the effective parties"); 131 Cong. Rec. H9916 (Rep. Hawkins) ("bipartisan efforts" and "compromise" produced the 1985 Amendments). The compromise bill was supported by the National Association of Counties [of which Harris County is a member], the National Public Employer Labor Relations Association [in which Harris County participated], the U.S. Conference of Mayors, the National League of Cities, the National Conference of State Legislatures, the International Union of Police Association [of which the Deputies are members], the AFL-CIO [in which the Deputies are members], and other major public employer associations and public employees unions and associations.

support representing both the deputies and the County in this litigation, the 1985 FLSA Amendments were quickly and unanimously enacted by Congress. (App. G, H, and I, Pet. App. 60a *et seq.*).

Among the provisions in the resulting statute was FLSA Section 207(o) which accommodates the preexisting practice among state and local employers and the need and expressed preference for work place flexibility among their employees. The new public sector compensatory rule provided that, pursuant to strict conditions, a public employer may pay FLSA premium compensation for overtime in compensatory time off in lieu of cash. The provision is an exception to the general requirement that all overtime must be paid in cash. Compensatory time under the Act may be used only by qualifying public employees and only under strict conditions designed to prevent employer manipulation of the employee's right to time and one half remuneration for overtime. A public employer is permitted to deviate from the basic rule that employers are required to pay their employees in cash for all overtime work only pursuant to a compensatory time system which meets the standards of Section 207(o). As an exception to the more general prohibition on the use of compensatory time off as compensation, Section 207(o) was designed to be narrowly construed under strictly enforced conditions. *See, Overnight Motor Transport v. Missel*, 316 U.S. 572, 576 (1941); *Phillips v. Wallace*, 324 U.S. 490, 493 (1945); *Powell v. United States Cartridge Co.*, 399 U.S. 497, 516 (1950); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1947). In addition as the Eighth Circuit wrote in *Eaton*, the maxim of statutory construction *inclusio unius est exclusio alteris* is particularly appropriate when the statutory language being interpreted is an exception to a general rule. "When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Raleigh & Gaston Ry. v. Reid*, 80 U.S. 269, 270 (1871).



Congress mandated the issuance of regulations necessary to implement the 1985 amendments after an open regulatory comment period. P.L. 99-150, § 6 (1985).[12] The Department of Labor, in turn, conducted an extensive rule making and solicited and carefully considered the views of state and local governments and of public employees. *See*, 52 Fed. Reg. 2012-15 (1987). Again public employers and employee representatives, including organizational representatives of Harris County and the Deputies in this case, contributed. *See*, 51 Fed. Reg. 25710 (July 16, 1986) and 52 Fed. Reg. 2012 (January 16, 1987). (*See*, App. J.) The Department of Labor's final regulations and discussion of the major comments received during the related comment period were published in January 1987. The final rule clarified the nature of accrued FLSA public sector compensatory time as a "bank" which is "preserved and used," and of which a record is kept. The DOL's response to comments emphasized employee flexibility; an accrued account to be administered with an element of employee choice and with the voluntary, knowing and willing agreement of the employee, absent any element of employer coercion. The employee's compensatory bank may not be used to avoid the cost of overtime at premium rates and its use may not be controlled by the scheduling convenience or inconvenience of the employer.[13] *See*, App. J, Pet. App. 79a *et seq.*

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12. When in 1974, Congress enacted the FLSA amendments which initially extended its coverage to state and municipal employees, Congress expressly indicated an intent that the Act would be administered after 1974 "in such a manner as to insure consistency with the meaning, scope, and applications established by rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy." H. Rep. 913, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811.

13. The regulatory comments spoke directly to the question presented here—

(Cont'd)

(Cont'd)

1. The National League of Cities [the "NLOC"] recommended that a DOL reference to an "element of flexibility" for the employer and an "element of choice" for employees in 29 C.F.R. § 553.20 should be eliminated. The DOL kept the reference, pointing out that —

> [t]he legislative history indicates that the intent of section 7(o) was "to provide flexibility" to state and local government employers and an "element of choice" to their employees regarding compensation for statutory overtime by covered employees. (*Citing*, H. Rep. at 19).

2. The DOL accepted suggestions that it make 29 C.F.R. § 552.23 clear that provisions contained in compensatory time agreements which conflict with Section 7(o) are not valid.

3. The Public Employee Department, AFL-CIO, and other public employee representatives, expressed concern that the regulations leave no doubt that the element of choice in employees' use of compensatory time would not allow a unilateral employer imposed system. The DOL pointed out that the House Report states at page 20 that, "The use of compensatory time in lieu of cash must be pursuant to some form of agreement or understanding between the employer and the employee, or notice to the employee, prior to the performance of the work." The DOL emphasized that if the notice option is used employees must accept compensatory time "freely and without coercion" and maintained that language in 29 C.F.R. § 553.23(c).

4. The NLOC suggested that the "element of choice" allowed employees in some situations might be so small as to be limited to the freedom not to accept the position and find other employment. The DOL rejected this stating that both the Senate and the House provide that the agreement or understanding to provide compensatory time off in lieu of cash overtime compensation may be made a condition of employment but "**only so long as** (i) the employee knowingly and voluntarily agrees to it as a condition of employment and (ii) the employee is informed that the comp time received may be **preserved**, used, or cashed out consistent with the provisions of the new subsection." (*Citing*, S. Rep. 11 and H. Rep. 20 (emphasis supplied)).

(Cont'd)



(Cont'd)

5. The NLOC suggested that the requirement that the employee "knowingly and voluntarily" agree to compensatory time agreements as a condition of employment be deleted. The DOL refused, stating that both the House and Senate legislative histories support the requirement. (*Citing*, H. Rep. at 20; S. Rep. at 11).

6. Commenters suggested revisions in 29 C.F.R. § 553.25's rules on the preservation and use of comp time. The AFL-CIO asked that it be made clear that the intent of the Act was to give employees the right to receive compensatory time and not the employer "the right to grant it." The DOL responded that —

> [t]he legislative history does indicate that an employee should not be coerced to accept more compensatory time in lieu of overtime pay than an employer can realistically and in good faith expect to be able to grant the employee within a reasonable time of his or her making a request to use such time. The rule has been modified to make clear that compensatory time is not envisioned as a means to avoid overtime compensation, (H. Rep. at 23), and that an employee has a right to be able to use the compensatory time earned.

7. The NLOC disagreed with the statement in 29 C.F.R. § 553.25 that "mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time." The DOL insisted on keeping the rule. (*Citing* H. Rep. at 23, and S. Rep. at 12). The DOL also pointed out that the Congress has directed that for employees where problems of disruption of service to the public are persistent, compensatory time should not be the preferred method of compensating for overtime work.

8. The methodology developed by the DOL to estimate the cost of compliance with the compensatory time provisions make clear that accrued compensatory time should be viewed as a "bank" or "saving" of compensatory time for later use to the call of the employee and not as a reserve of time which an employer might use as a reserve for mandatory time off during down time. (51 Fed. Reg. 25710 (July 16, 1996) and 52 Fed. Reg. 2012 (January 16, 1987).

(Cont'd)

The 1985 Amendments and their regulations dramatically changed, for public agencies and no one else, the rules regarding compensatory time off. It created an exception to the Act's general prohibition of compensatory time in lieu of cash so long as the compensatory time system is in the public sector and so long as it is provided under a collective bargaining agreement, employment agreement, or a memorandum of understanding. (29 U.S.C. § 207(o), App. E, Pet. App. 32a-38a). The agreement can be made in one of three ways: (1) through negotiation with a recognized collective bargaining agent, where one exists; (2) through negotiation with the employees' representatives, where one has been designated in a jurisdiction which allows such designation; or (3) where there is no collective bargaining agent or employee representative through negotiation with individual employees. (29 U.S.C. § 207(o)(2); 29 C.F.R. § 553.23). Any such agreement must meet the following conditions set forth in House Report 99-331, 99th Cong. 1st Sess. 10 (1985) —

> The agreement or bilateral understanding to provide time off as compensation for overtime may take the form of an expressed condition of employment, so long as (1) the employee knowingly agrees to it as a condition of employment, and (2) the employee is informed that the compensatory time received may be preserved, used, or cashed out consistent with

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(Cont'd)

Finally, 9. DOL's record keeping rules with regard to compensatory time in 29 C.F.R. § 553.50, are consistent with the view of accrued comp time as a bank owned by the employee and require that the agreement or understanding allowing and controlling its preservation and use of compensatory time must either be a written document or must be preserved in a record of its existence. 29 C.F.R. § 553.50(d).

*See*, App. J, Pet. App. at 79a *et seq*.



> the provision of this new subsection [§ 207(o)]. The agreement or understanding may include other provisions governing the preservation, use or cashing out of compensatory time so long as those provisions are consistent with this subsection of the Act. (bracketed material supplied.)

Where the employees do not have a representative, whether they have not designated one or whether under the law of the jurisdiction the state and local government will not treat with one, the agreement with the employee must be arrived at before the work is done. (29 C.F.R. § 553.23(a)).

A Section 207(o) compensatory time agreement may be a condition of employment, however, even where a condition of employment is involved the employee's decision to accept compensatory time must be made "freely and without coercion or pressure." (29 C.F.R. § 553.23(c); and *Moreau v. Klevenhagen*, 508 U.S. 22 (1993)).

FLSA compensatory time must be paid, like cash overtime, at premium rates of time and one half, that is 90 minutes for each 60 minutes worked. (29 U.S.C. § 207(o)(1); 29 C.F.R. §§ 533.20 and 553.22). Employees such as the Deputies in this case may accumulate up to 480 hours of compensatory time. (29 U.S.C. § 207(o)(3); and 29 C.F.R. § 553.25). Requests by an employee to use accrued compensatory time must be granted if made within a reasonable time and if granting the request does not "unduly disrupt" the operations of the agency. (29 U.S.C. § 207(o)(5) and 29 C.F.R. § 553.25). Undue disruption of operations, and not budgetary considerations, is the **only** allowable reason for denying compensatory time. Undue disruption is more than inconvenience to the employer and the fact that an employer must pay a substitute overtime at premium rates is not a legitimate reason for denying access. (DOL Letter Ruling, August 19, 1994).

An employer may freely substitute cash payment, in whole or in part, for compensatory time off. (29 C.F.R. § 553.26). However, the regulations are clear that compensatory time is not to be used as a means of avoiding overtime compensation, and that, therefore, more compensatory time may not be used than an employer can realistically, and in good faith, expect to be able to grant to the employees' request. (29 C.F.R. § 553.25(b)). Public employers may, of course, choose not to enter non-coercive bilateral compensatory time agreements with their employees. However, if they choose that option, the default rule is that they must pay their employees in cash for overtime or add employees to eliminate the need for overtime.

Since the enactment of the 1985 Amendments and the promulgation of its implementing regulations, this Court has issued two major decisions concerning the application of the Act to public employees. In *Moreau v. Klevenhagen*, 508 U.S. 22 (1989), a dispute like this one involving Harris County sheriff's deputies, the Court ruled that, in a jurisdiction like Texas in which state or local law does not provide for collective bargaining, under Section 207(o)(2)(A)(ii) an "agreement between the employer and the employee" is one of the necessary prerequisites to an employer's access to a compensatory time compensation system. *Auer v. Robbins*, 519 U.S. 452 (1997) is the central precedent relied on by Judge Dennis in his dissent in this case, in which he would have ruled that the dispute here should have been remanded to the district court to be resolved in light of *Auer*'s direction that such disputes are controlled by the Secretary of Labor's interpretation of the applicable regulations.

Coming to the Court with his background, this case now presents a battle of alternative interpretations of the rules applicable to the use of compensatory time in lieu of cash overtime by a public employer.



**Is the Fifth Circuit majority opinion below correct in the application of its "default rule" to the question, that is, do Section 207(o) and its regulations provide that, in a jurisdiction without collective bargaining, an employer may withdraw banked compensatory time from an employee by mandatory time off over the employee's objection on the rule of construction that where there is no express statutory language to the contrary, the employer has complete discretion to manage hours of work and compensation of common law employees?**

**Or, is the Eighth Circuit in *Heaton* correct in its ruling that Section 207(o) requires that compensatory time once earned belongs to the employee and may not be withdrawn except at the employee's direction?**

**Or, is dissenting Judge Dennis case correct that under the Act, its implementing regulations, and the *Auer* rule, the employer must preserve an employee's compensatory time bank absent use of the compensatory time at the employee's request unless an express mutually arrived at agreement between the employee and the employer allows the employer to "burn off" the employee's compensatory time through mandatory time off?[14]**

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14. Judge Dennis' dissent concluded —

> Applying the provisions of the statute and the regulations to the present case, it is apparent that neither the plaintiffs nor the defendants have demonstrated that they are entitled to judgment as a matter of law under the FLSA as interpreted by the Secretary. Moreover, we should take notice that agreements between the County and each individual employee incorporating the County's regulations providing for compensatory time in lieu of monetary overtime compensation apparently actually exist. *See, Moreau v. Klevenhagen*, 508 U.S. 22, 29 (1993). The record before

(Cont'd)

## II.

## THERE IS A SEVERE CONFLICT BETWEEN THE CIRCUITS AS TO THE APPLICATION OF SECTION 207(o) OF THE FLSA.

It would be difficult to imagine a clearer conflict among the circuits than the conflict on this issue between the view of the Eighth Circuit in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir, 1994), *cert. denied sub nom. Schriro v. Heaton*, 515 U.S. 1104 (1985), and the views expressed by the Fifth Circuit in *Alford v. State of Louisiana*, 145 F.3d 280, 285 (5th Cir. 1998) and this case, *Moreau v. Harris County*, 158 F.3d 241 (5th Cir. 1998). The decision below expressly states: "This case squarely presents the *Heaton* issue, and we must thus decide whether to extend *Alford* or follow *Heaton*. We choose to extend *Alford*. The reasoning in *Heaton* is flawed." 158 F.3d at 245. It could not be more apparent or troubling that public employees' rights within the Eighth Circuit jurisdiction, and those courts choosing

(Cont'd)

> us, however, is not sufficiently complete to afford an adequate basis for determining whether provision granting the preservation, use and cashing out of compensatory time are included in these agreements, by incorporation or otherwise; or if so, whether these other provisions are consistent with or in violation of section 7(o) of the Act. If no controlling agreement exists, the district court should consider retaining jurisdiction while permitting the parties to enter such agreement. A court of appeals may vacate, set aside, or reverse the district court's judgment and remand the case and require further proceedings to be had as may be just under the circumstances . . . Accordingly, under these authorities and the summary judgment rules, I would vacate the district court's judgment and remand the case to it for further proceedings including a trial or the taking of additional evidence necessary to an informed decision on these questions. (Pet. App. at 20 (citations omitted)).



to follow *Heaton*, are radically different than those working in the Fifth Circuit, and those courts choosing to follow the *Moreau/Alford* view.

It defies logic that "Congress intended for the protections afforded by the [FLSA] to hinge upon the accident of the State in which the employee happens to reside." Chief Judge Ervin, dissenting in *Wilson v. City of Charlotte*, 964 F.2d 1391 (4th Cir. 1992).

## III.

## THE FIFTH CIRCUIT DECISION BELOW CONSTITUTES AN ERRONEOUS INTERPRETATION OF FEDERAL LAW.

The court below ruled that —

> . . . [T]his is a situation in which Congress has not spoken clearly in the text of the statute itself or in the legislative history. . . . In this case, the parties have not identified any controlling provision [in an compensatory time agreement under § 207(o)], and our obligation is to fashion a background rule, which the parties remain free to displace by future negotiations. . . . [W]e recognize that a default rule should not always be tailored to achieve the most efficient or most just result for the parties in the lawsuit. In many situations, an "untailored default," a "single, off-the-rack standard" that provides a satisfactory contractual solution in the run of cases may be preferred. Ian Ayers & Robert Gertner, "Filling the Gaps in Incomplete Contracts: An Economic Theory of Default Rules," 99 *Yale L. J.* 87, 91 (1989).

> This is such a case. A holding that employees by default may bank their comp time would be as clear as the holding that we reach today. But a default rule should be selected at a higher level of abstraction, to ensure clear answers in other FLSA scenarios where neither Congress nor the parties in an agreement have resolved a particular issue. . . . In general, allowing an employer to establish uniform employment practices with respect to questions not previously negotiated seems preferable to a regime in which the courts determine which default rule is best to apply one policy at a time. (Pet. App. 12a).

This ruling is made: (1) without reference to the fact that the compensatory time provision in Section 207(o) was a legislative exception in which the "default" rule is one which provides for mandatory cash overtime; (2) without reference to the fact that the FLSA is a national hours of work standards law which is intended to create an incentive to having additional work done by additional employees through a time and one-half disincentive to cash overtime; (3) without reference to the fact that the central basis for national minimum wage and maximum hour standards is to avoid the traditional "default rule" in the work place which assumes that employers will always create work rules on the basis of their individual economic needs; and, most importantly; (4) without any effort to apply the applicable regulations or to discern the Secretary of Labor's interpretation of the provision within the FLSA authorizing compensatory time as a substitute for cash overtime.

Judge Dennis in his dissent emphasized the need for a remand to the district court for a decision applying the Secretary of Labor's interpretation of Section 207(o). The dissent and not the majority opinion is properly guided by this Court's rule in these matters. Where, as the court below found, "Congress



has not spoken clearly in the text of the statute or the legislative history," but where the Congress has clearly vested the Secretary of Labor with the authority to issue regulations under the statute and to apply, interpret, and enforce those regulations, the interpretation by the Secretary of Labor is the reference point which controls judicial application of the statute. *Auer v. Robbins*, 519 U.S. 452 (1997).

In failing to give controlling deference to the regulations and interpretation of the Secretary of Labor the Court below erred in its application of the FLSA.

## CONCLUSION AND PRAYER

For the foregoing reasons, this petition for *certiorari* should be granted.

Respectfully submitted,

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15. Amber Bell, Esquire, 4012 Williamsburg Court, Fairfax, Virginia, participated in the preparation of this Petition for *Certiorari*.

# APPENDIX

## APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED OCTOBER 19, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CA-94-1427
No. 97-20796

LYNWOOD MOREAU; KENNETH O. ADAMS; DAVID W. ADDISON, JOSE A. ALVARADO; ROBERT AMBOREE; BOBBY G. ANDREWS; RANDY ANDERWALD; GARY R. ASHFORD, CRAIG L. BAILEY; RICHARD BAILEY; RICHARDO E. BALDERAZ; HERBERT V. BARNARD; GERALD BARNETT; PAULETTE M. BARNETT; BRAD T. BENNETT; BRIDGETT BLACKMON; FLYNT E. BLACKWELL; GARY F. BLAHUTA; SCOTT P. BLANKENBURG; DEBORAH BLIESE; BRUCE H. BRECKENRIDGE; J.W. BROOKS; BRIAN BUCHANAN; PATRICIA M. BUI; DON E. BYNUM; CLARENCE A. CALLIS; WILLIAM M. CAMPBELL; HEATHER CARR; THOMAS J. CARR; PAUL E. CARPENTER; ROBERT CASEY; MARK E. CEPIEL; ELADIO C. CHAVEZ; EDWARD A. CHRISTENSEN; ROY CLARK; DENNY D. COKER; ALFORD A. COOK; GREGORY P. COX; DONALD D. CRAYTON; RICHARD D. CROOK; DAVID A. DAVIS; GARY W. DAVIS; CHRISTOPHER E. DEMPSEY; RUSSELL DUKES; LARRY A. EIKHOFF; FRANK FAIRLEY; DAVID W. FINELY; JAMES P. FITZGERALD; ERINE R. FOWLER; MICHAEL A. GARCIA; THOMAS M. GENTRY; JOHN GODEJOHANN; ROBERT M. GOERLITZ; DAVID GONZALES; RAUL V. GONZALES; MIGUEL A. GONZALEZ; BILLY GRAY; WILLIAM L. GRAY; LAWRENCE P. GRIES; THOMAS P. GURNEY; PRESTON

*Appendix A*

R. HALFIN; SAMMY HEAD; NEIL HINES; LARRY D. HOWELL; MARSHALL P. ISOM; JAMES A. JOHNSON; DERRY L. JONES; DAVID E. KAUP; WILLIAM C. KENISELL; HOWARD J. KIMBLE; STEVE KIRK; EDGAR D. KNIGHTEN; FREDDY G. LAFUENTE; MICHAEL G. LAGRONE; AL LANFORD; VERNON S. LEMONS; SHEMEI B. LEVI; JEANNE LONG; TIMOTHY LOYD; JOE S. MAGALLON; DAVID B. MARTIN; PEDRO MARTINEZ; RUSSELL L. MAYFIELD; TERRY MCGREGOR; ROBERT C. MEAUX; STEPHEN MELINDER; MARTY M. MINGO; D.D. MONTGOMERY; JOSE L. MORIN; RICHARD O. NEWBY; ARTHUR W. NOLLEY; WILLIAM R. NORWOOD; RICHARD C. NUNNERY; KAREN D. O'BANNION; RAYMOND E. O'BANNION; GUADALUPE PALAFOX; WAYNE PARINELLO; DEBORAH PETRUSKA; JAMES A. PHILLIPS; SIMON C. RAMIREZ; MICHAEL B. RANKIN; JAMES C. REYNOLDS; WILLARD G. ROGERS; GERALD M. ROBINSON; JOE RUFFINO; LANCE J. SCOTT; ROB R. SELF; DONALD SHAVER; JAMES K. SHIPLEY; JAMES SMEDICK; GINA K. SPRIGGS; (GRAHMANN); JEFFREY M. STAUBER; LARRY L. STRICKLAND; BILLY J. TAYLOR; KERRY TOWNSEND; RICHARD S. TRENSKI; GORDON TROTT; ED TROTTI; RICHARD D. VALDEZ; DALTON E. VAN SLYKE; FRANK L. VERNAGALLO; RUBEN VILLARREAL; JOHNNY F. WALLING; GERALD R. WARREN; JAMES M. WATSON; THOMAS G. WELCH; JOHN H. WHEELER; JOSEPH L. WILLIAMS; RWANDA WILTZ,

Plaintiffs-Appellees,

versus



*Appendix A*

HARRIS COUNTY; TOMMY B. THOMAS; JOHNNY KLEVENAGEN, Sheriff

Defendants,

HARRIS COUNTY; TOMMY B. THOMAS,

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Texas

Before HIGGINBOTHAM, PARKER and DENNIS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Harris County appeals a grant of summary judgment in favor of a certified class of employees, finding that the County's policy requiring the use of accrued compensatory time by its employees contravened 29 U.S.C. § 207(o)(5) of the Fair Labor Standards Act (FLSA). We are persuaded that the 1985 Amendments to the FLSA do not grant public employees a right to choose when they will use accrued comp time. We reverse.

I.

The members of the class are employees of the Sheriff's Department of Harris County. The class asserted claims for wrongful refusal of compensatory time off, retaliation and involuntary use of compensatory time.

*Appendix A*

The parties have stipulated to the essential facts. By County policy the accrued comp time for non-exempt employees must be kept below a predetermined level, set by each bureau commander. This level is based on the personnel requirements of each bureau.

An employee reaching the maximum allowable hours of comp time authorized by the FLSA is requested to take steps to reduce the number of accrued hours. A supervisor is authorized to order the employee to reduce accumulated comp time at a time suitable to the bureau. An employee dissatisfied with his supervisor's order may informally complain to higher levels of supervisory authority within the department.

Based upon the stipulation of facts, the district court ordered the parties to move for summary judgment and to address whether the County policy requiring the involuntary use of comp time by its employees contravened 29 U.S.C. § 207(o)(5) of the FLSA.

On November 26, 1996, the district court issued an "Opinion on Summary Judgment" and an Interlocutory Declaratory Judgment that "Harris County may not force employees to use their accumulated comp time without violating the FLSA" and asked for briefing from both parties on attorneys' fees. Then, on July 28, 1997, the district court issued an order entitled "Final Judgment" which stated the following:

Final Judgment

1. Harris County may not force employees to use their accumulated compensatory time without violating the Fair Labor Standards Act.



*Appendix A*

2. The parties plaintiff are awarded attorneys' fees of $21,360 from Harris County.

Plaintiffs did not ask the district court to rule on their claims for wrongful refusal of the use of comp time and for retaliation and it did not do so. This appeal followed.

II.

A.

First, there is our jurisdiction. The record on appeal indicates that the claims for wrongful refusal of the use of comp time and for retaliation have not been ruled on by the district court. Responding to our question, Harris County agreed with the class that we have jurisdiction since the district court intended its order to be a final judgment.[1]

We have jurisdiction only over final decisions of the district court, with limited exceptions that are not relevant here. 28 U.S.C. § 1291 (West 1993). A final judgment is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978). We have advocated a practical approach in deciding issues of finality. A judgment reflecting an intent to dispose of all issues before the district court is final. *Vaughn v. Mobil Oil Exploration and Producing Southeast, Inc.*, 891 F.2d 1195, 1197 (5th Cir. 1990); *Nat'l Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio, Tex.*,

1. Plaintiffs did not address the jurisdictional issue in their briefs. However, at oral argument plaintiffs' counsel acknowledged that this court had jurisdiction over this appeal.

40 F.3d 698, 705 (5th Cir. 1994). If a party abandons one of its claims, a judgment that disposes of all remaining theories is final and appealable so long as it is apparent that the district judge intended the judgment to dispose of all claims. *Chiari v. City of League City*, 920 F.2d 311, 314 (5th Cir. 1991). When the district court hands down a judgment couched in language calculated to conclude all claims before it, that judgment is final. *Armstrong v. Trico Marine, Inc.*, 923 F.2d 55, 58 (5th Cir. 1991).

Here, the district court in entering final judgment appeared to decide all claims, although it did not explicitly address plaintiffs' wrongful refusal and retaliation claims. Nevertheless, plaintiffs did not pursue any error by the district court and acknowledged at oral argument that we have this jurisdiction over this appeal. We conclude that the district court decided all claims before it that were not abandoned. The order is a final judgment for purposes of this appeal.

B.

This dispute centers around Harris County's policy of not permitting accrued comp time for non-exempt employees to rise above a predetermined level by directing employees to reduce the number of hours of accrued comp time. The district court held that accumulated comp time and salary must be treated the same way and that employees have a right to use comp time when they choose. Granting summary judgment for the class, the district concluded that Harris County's policy of controlling the amount of accrued comp time violated the FLSA. More precisely put, we must decide whether Harris County violates 29 U.S.C. § 207(o)(5) of the FLSA when it involuntarily shortens an employee's workweek with pay.





The relevant FLSA statute states:

> (5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency —
>
> (A) who has accrued compensatory time off authorized to be provided under paragraph (1), and
>
> (B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

29 U.S.C. § 207(o)(5) (West Supp. 1998).

Harris County contends that the 1985 Amendments to the Fair Labor Act of 1938, reflected above, were enacted to alleviate the economic burden upon state and local governments imposed by the Act's cash overtime requirements, *see Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (holding, in a 5-4 decision, that the FLSA could constitutionally apply to states and their political subdivisions), as were the implementing Department of Labor regulations. The County urges that Congress must have intended for public employers to control the accrual of comp time because Congress contemplated a circumstance in which a public employer may elect to reduce or eliminate accrued comp time by making a cash payment. They point to 29 U.S.C. §207(o)(3)(B) which states that "if compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the

regular rate earned by the employee at the time the employee receives such payment." Since this statute permits a public employer to reduce accrued comp time with cash payments, Harris County asserts that reductions in comp time must be at the employer's option.

The class contends that Congress vested the employee, rather than the employer, with the right to determine the use of accrued comp time off. They urge that 29 U.S.C. § 207(o)(5) imposes only one limitation on this right — that the use of the comp time not unduly disrupt the operations of the public agency. The plaintiffs maintain since no other limitation on this right was imposed by Congress, they could choose to use or to bank their comp time as they see fit. In their view, employers do not have the right to control employees' use of their accrued comp time, so long as their use does not unduly disrupt their operations.

The economic incentives at stake are clear. In an era of tight public budgets, state employers like Harris County wish to control the accrual of comp time in order to avoid paying cash overtime wages when the amount of accrued comp time for any employee reaches the statutory maximum of 240 or 480 hours. The state employees, on the other hand, want to accumulate accrued comp time up to the statutory maximum in order to receive cash payments at an overtime rate of time and one-half or at least retain the ability to "bank" comp time for later use at their behest.

Section 207(o)(5) does not address the Harris County policy. This statute is triggered only when the employee first requests the use of her accrued compensatory time and does not address whether a public employer may control an



employee's accrual of comp time. *See Heaton v. Moore*, 43 F.3d 1176, 1181 (8th Cir. 1994). On its face then the statute is inapplicable to the present dispute. The class counters that the statute evidences Congress' belief that the use of accrued comp time must reside only with the employee and not the employer. The statute recognizing public employers' ability to pay down accrued comp time, 29 U.S.C. § 207(o)(3)(B), equally reflects Congressional intent to permit public employers to control the accrual of comp time.[2] Congress wanted to balance competing interests and intended for both public employers or employees to retain some control over accrued comp time.

Congress amended the FLSA in 1985 to ease the cost to state and local governments of complying with the FLSA, particularly its overtime payment provisions. During the debates, Congress considered proposals for an amendment exempting governmental agencies from the FLSA. Rather than completely excluding agencies from the reach of the FLSA, Congress balanced the burden of complying with the FLSA's overtime provisions with protection for the worker. *See* Todd D. Steenson, Note, *The Public Sector Compensatory Time Exception to the Fair Labor Standards Act: Trying to Compensate for Congress' Lack of Clarity*, 75 Minn. L. Rev. 1807, 1812, 1828 (1991). The 1985 Amendments accomplished this dual purpose by allowing public employers to agree with employees to award comp time in lieu of monetary payments at a rate not lower than one and one-half hour for every overtime hour an employee works. *Id.* at 1812. Under this scheme, employees working overtime would receive additional time off

2. Along the same lines, 29 C.F.R. § 553.27(a) states that "[p]ayments for accrued compensatory time earned after April 14, 1986, may be made at any time and shall be paid at the regular rate earned by the employee at the time the employee receives such payment."

from the job with pay but not cash at the higher overtime rates. In sum, Congress did not consider or resolve the question that we face here. Because the legislation reflected a compromise, it is impossible to determine how Congress would have legislated had it confronted the question. Before devising our own solution, we must of course look to precedent.

C.

Relying on the Eighth Circuit's opinion in *Heaton*, the class urges that since "banked compensatory time is the property of the employee," they have the right to "bank" comp time in "what amounts to an employee-owned savings account of compensatory time." *See Heaton*, 43 F.3d at 1180. We have recently held that the 1985 Amendments to the FLSA, and section 207(o) in particular, do not reflect Congressional intent to create a property right in accrued comp time for employees. *See Alford v. Louisiana*, __ F.3d __, draft op. at p. 12 (5th Cir. 1998). *Alford*, however, sought to distinguish *Heaton*. In *Alford*, the employees merely sought to require employees to use comp time before dipping into annual leave, while in *Heaton*, the employer sought to require use of comp time before the use of annual leave. This case squarely presents the *Heaton* issue, and we must thus decide whether to extend *Alford* or to follow *Heaton*.

We choose to extend *Alford*. The reasoning in *Heaton* is flawed. The *Heaton* court rested on the principle of construction that "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Id.* at 1180 (internal quotation marks omitted). Because employees may choose to use their compensatory time within certain limits, the argument continues, employers cannot make the employees use the compensatory time sooner than the employees prefer.



This seems to be a misapplication of the relevant rule of construction. The question here is whether the statute "limits" the the "thing to be done," and thus application of the rule begs the question. Compare, for example, the Supreme Court case *Heaton* cites as originally invoking this rule of construction, *Raleigh & Gaston Ry. v. Reid*, 80 U.S. (13 Wall.) 269, 270 (1871). In that case, a railroad company's charter provided that it should not be taxed for 15 years, and the Court held that by implication it could be taxed thereafter. That seems straightforward enough, but the same principle cannot mean that because an employee with comp time available can choose to use this comp time, an employer can never require an employee to reduce accumulated comp time. One simply does not relate to the other.

It is perhaps understandable that *Heaton*'s reasoning should be strained, because this is a situation in which Congress has not spoken clearly in the text of the statute itself or in the legislative history. Of course, we could still follow *Heaton* on prudential grounds, or simply to avoid an intercircuit conflict. This, however, would be a mistake, for it would leave the jurisprudence in this circuit unnecessarily confused. There seems no reason to allow our rule to turn on the issue of whether an employer conditions its requirement that an employee use comp time on the employee's attempt to take annual leave. We are bound by *Alford*, and if we were to follow *Heaton*, employers and employees through the Circuit would need to brace themselves for expensive litigation over what conditions an employer could place on an employee's annual leave.

The lack of uniformity occasioned by our decision to deviate from the Eighth Circuit is not a substantial concern in this context. Even in the absence of further congressional or

regulatory action, neither *Heaton*, nor *Alford*, nor our extension of it today represents the final word in any workplace. In the absence of a mandatory rule governing the situation, the parties remain free to reach a contractual solution to the problem. Provisions of an agreement between a covered employer and employees with regard to compensatory time are valid so long as they do not contradict the FLSA itself. *See* 29 C.F.R. § 553.23(a)(1). In this case, however, the parties have not identified any controlling provisions, and our obligation is to fashion a background rule, which the parties remain free to displace in future negotiations.

While *Alford* did not make explicit that its rule is only a default, it is worth noting that the default it selected was almost certainly the correct one. In fashioning a default rule, we are mindful of the academic consensus that the court's task is not simply to construct the rule that the parties would have bargained for if they had been fully informed and bargaining had been costless. *See generally Symposium on Default Rules and Contractual Consent*, 3 S. Cal. Interdisciplinary L.J. 1 (1993). Moreover, we recognize that a default rule should not always be tailored to achieve the most efficient or most just result for the parties to the lawsuit. In many situations, an "untailored default," a "single, off-the-rack standard" that provides a satisfactory contractual solution in the run of cases may be preferable. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 91 (1989).

This is such a case. A holding that employees by default may bank their comp time would be as clear as the holding that we reach today. But a default rule should be selected at a higher level of abstraction, to ensure clear answers in other FLSA



scenarios where neither Congress nor the parties in an agreement have resolved a particular issue. *See, e.g.*, Ayres & Gertner, *supra*, at 96 (noting the importance of minimizing future litigation costs in establishing a default rule). In general, allowing an employer to establish uniform employment policies with respect to questions not previously negotiated seems preferable to allowing each employee to establish his or her own policy, and it is certainly preferable to a regime in which the courts determine which default rule is best to apply one policy at a time.

Our holding here and in *Alford* is thus merely an application of the general principle that the employer can set workplace rules in the absence of a negotiated agreement to the contrary.[3] While this default may not achieve the optimal solution in every case, it promotes justice writ large. In establishing this approach, we expect to promote the interests of employers and employees alike by minimizing the need for future litigation concerning policies not addressed by Congress or employer-employee agreements. And, of course, this general interpretive approach is itself a default, and the parties may select a different rule governing the construal of their agreements if they choose.

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3. There may be situations in which an employer is required to negotiate before establishing a workplace rule. *See,e.g., National Labor Relations Bd. v. Katz*, 369 U.S. 736, 747 (1962). The employees here, however, have not alleged a violation of the National Labor Relations Act. This opinion's analysis is consistent with any limitations on unilateral action that may exist. While an employer in certain circumstances may not be able to set forth a uniform policy, the rule that employers may require employees to use comp time applies even if that rule has not been duly enacted as a workplace policy, in the absence of an agreement to the contrary.

III.

We REVERSE the district court's grant of summary judgment in favor of the class and enter judgment for Harris County and all other defendants.

REVERSED.

DENNIS, Circuit Judge, Concurring in part and dissenting in part.

In my opinion neither the plaintiffs nor the defendants have demonstrated that they are entitled to judgment as a matter of law on the present record. Accordingly, I agree that the district court's judgment must be reversed. I disagree, however, with the majority's decision to grant summary judgment for the county at the appellate level. The majority incorrectly applies its own common law type "default rule" rather than following the Secretary's authoritative interpretation of the FLSA. Consequently, the majority erroneously fails to remand the case to the district court for trial or other proceedings as is required by the correct legal principles.

The FLSA does not directly address the precise question at issue in this case, viz., whether a public agency may, absent an employee's request or agreement, unilaterally compel the employee to use accrued compensatory time off rather than receiving cash compensation for the accrued compensatory time off in accordance with § 207(o)(3)(B). Because the statute is silent or ambiguous with respect to the specific issue, the questions for this court are whether the administrative agency has addressed the issue, and, if so, whether the agency's answer is based on a permissible construction of the statute. *Chevron*



*U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Auer v. Robbins*, 117 S.Ct. 905, 909 (1997)(quoting *Chevron*, 467 U.S. at 842-843). A court does not simply impose its own construction on the statute when an administrative interpretation based on a permissible construction of the statute exists. *Chevron, U.S.A., Inc.*, 467 U.S. at 843; *Fort Hood Barbers Assn. v. Herman*, 137 F.3d 302, 307 (5th Cir. 1998)(Summary Calendar).

The deference owed by this court to administrative regulations issued to interpret and implement a federal statute depends on whether the regulation is "legislative" or "interpretative." *Fort Hood Barbers Assn.*, 137 F.3d at 307; *Snap-Drape, Inc. v. Comm'r*, 98 F.3d 194, 197 (5th Cir. 1996); *Dresser Industries, Inc. v. Comm'r*, 911 F.2d 1128 (5th Cir. 1990)(internal citations omitted). If legislative, that is "issued under a specific grant of authority to prescribe a method of executing a statutory provision," the regulation is controlling unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Snap-Drape, Inc.*, 98 F.3d at 197-98 (internal citations omitted); *see also Chevron, U.S.A., Inc.*, 467 U.S. at 843. An "interpretative" regulation is one promulgated pursuant to a "general grant of authority to prescribe regulations." Interpretative regulations are accorded less deference, but are valid if they are "reasonable and 'harmonize[ ] with the plain language of the statute, its origin, and purpose.' " *Fort Hood Barbers Assn.*, 137 F.3d at 307 (quoting *Snap-Drape, Inc.*, 98 F.3d at 197).

The FLSA is administered and enforced by the Secretary of Labor. 29 U.S.C. §205; *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944); *Condo v. Sysco Corp.*, 1 F.3d 599, 604 (7th Cir. 1993); 1 ROTHSTEIN, ET AL., EMPLOYMENT LAW § 4.10 pp.

368-69 (1994). The 1984 amendments to the FLSA expressly authorize the Secretary to promulgate regulations as are necessary to implement the amendments. 99 Stat. 787, §6, 29 U.S.C. § 203 (note). Pursuant to this authorization, the Secretary has promulgated regulations interpreting and applying pertinent provisions of the FLSA regarding compensatory time off. *See* 29 C.F.R. §553.2(b), §§553.20-553.28. I believe the Secretary's regulations by clear implication address the issue in the present case.

The regulations reiterate that in compensating employees for overtime work, a public agency may not substitute compensatory time off for overtime cash pay unless there was an agreement or understanding to do so between the employer and the employee (or the employee's representative) prior to the performance of the work. §553.23(a)(1). With respect to employees not covered by a bargaining or representative's agreement, but hired before April 15, 1986, the regular practice in effect on that date constitutes an agreement which satisfies the statute. *Id.* Further, a notice to an unrepresented individual employee that compensatory time will be awarded in lieu of overtime pay can evidence an agreement as required by the FLSA. §553.23(c)(1). Although an agreement as required by the statute is presumed to exist if such notice is given with respect to any employee who does not communicate his unwillingness to accept compensatory time rather than overtime pay to his employer, the employee's decision to accept compensatory time "must be made freely and without coercion or pressure." *Id.* Finally, the agreement may take the form of an express condition of employment, if the employee knowingly and voluntarily agrees to it as a condition of employment and is informed that the compensatory time received may be preserved, used, or cashed out consistent with the provisions of section 7(o) of the Act. *Id.*



The agreement may include provisions restricting compensatory time off to certain hours of work only. §553.23(a)(2). Provisions governing the preservation, use, or cashing out of compensatory time also may be included; however, to the extent that any provision of an agreement is in violation of section 7(o), it is superseded by the requirements of section 7(o). *Id.*

The employer may discharge its obligation to honor accrued compensatory time earned after April 14, 1986, at any time by paying for it the regular rate earned by the employee at the time the employee receives payment. §553.27(a). Upon termination of employment, the employer must pay the employee for unused compensatory time earned after April 14, 1986, at a rate of compensation not less than the average regular rate received by such employee during the last 3 years of the employee's employment, or the final regular rate received by such employee, whichever is higher. §553.27(b).

Compensatory time cannot be used to avoid statutory overtime compensation. §553.25(b). "An employee has the right to use the compensatory time earned and must not be coerced to accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable time of the employee's request for use of such time." *Id.*

If an employee has accrued compensatory time and requests use of this compensatory time, the employer must permit the use of such time off within a "reasonable period" after the employee's request as long as such use will not "unduly disrupt" the operations of the agency. §553.25(a). A "reasonable period" will be determined by considering the customary work practices

within the agency based on the circumstances, including the normal schedule of work, anticipated peak workloads based on past experience, emergency requirements for staff and services, and the availability of qualified substitute staff. §553.25(c)(1). If applicable provisions are included within the agreement or understanding between the employer and employee, they will govern the meaning of "reasonable period." §553.25(c)(2). An "unduly disruptive" use of accrued compensatory time off is one which the agency reasonably and in good faith anticipates "would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public." §553.25(d).

The Secretary's approach rejects the wooden proposition that the FLSA grants control over the use of accrued compensatory time either exclusively to the employee or to the employer independently for its own unilateral purposes. Rather, it requires an agreement and understanding between the employer and the employee prior to the performance of the work to initiate compensation with, and accrual of, compensatory time off. As part of this agreement, the Secretary's construction also permits the employer and the employee to include other provisions governing the preservation, use, or cashing out of compensatory time so long as they are consistent with section 7(o) of the FLSA. These regulations indicate that the Secretary did not interpret the FLSA to allow an employer to require an employee involuntarily to use accrued compensatory time off in the absence of a lawful agreement providing such authorization.

In deciding whether the Secretary's approach qualifies as a permissible construction of the FLSA, it is not necessary to decide whether the Secretary's regulations issued pursuant to



authority granted by the 1985 amendments are legislative or interpretative. Even if the regulations are properly classified as interpretative, they clearly are reasonable and in harmony with the language of the statute, its origin, and purpose. In enacting the 1985 amendments to the FLSA, Congress clearly sought to balance the needs and interests of both public employees and employers subject to the FLSA. The Secretary's approach accomplishes this Congressional directive by requiring employers desiring authorization to order employees to use accrued compensatory time whenever the employer deems such consumption appropriate to include applicable provisions, consistent with the statute, in their agreements made with the employee.

With respect to employee requests for use of accrued compensatory time, the regulations specifically authorize the employer and employee in their agreement or understanding to state terms and conditions governing the meaning of "reasonable period." In addition, the Secretary sets forth a non-exclusive list of underlying considerations for use in determining the "reasonable period" within which a compensatory time off request must be granted and whether doing so would be "unduly disruptive" in a particular case. These regulations lead naturally and logically to the inference that the factors for evaluating the reasonableness and legality of any consensual limitations upon the employee's right to use and preserve compensatory time earned should be similar to those suggested for determining or defining a "reasonable period" within which an employer must grant a compensatory time off request, a use of compensatory time off that is "unduly disruptive" to the employer's operations, and a "realistic" and "good faith" utilization of compensatory time off in lieu of overtime cash pay by an employer.

Applying the provisions of the statute and the regulations to the present case, it is apparent that neither the plaintiffs nor the defendants have demonstrated that they are entitled to judgment as a mater of law under the FLSA as interpreted by the Secretary. Moreover, we should take notice that agreements between the County and each individual employee incorporating the County's regulations providing for compensatory time in lieu of monetary overtime compensation apparently exist. *See Moreau v. Klevenhagen*, 508 U.S. 22, 29 (1993). The record before us, however, is not sufficiently complete to afford an adequate basis for determining whether provisions governing the preservation, use, or cashing out of compensatory time are included within these agreements, by incorporation or otherwise; or if so, whether these other provisions are consistent with or in violation of section 7(o) of the Act. If no controlling agreement exists, the district court should consider retaining jurisdiction while permitting the parties to enter such agreements. A court of appeal may vacate, set aside, or reverse a district court's judgment and may remand the cause and require such further proceedings to be had as may be just under the circumstances. 28 U.S.C. § 2106. *See Youngstown Sheet and Tube Co. v. Lucey Products Co.*, 403 F.2d 135, 139-41 (5th Cir. 1968) (Remanded to allow submission of proof to insure that substantial justice be done). *See also Hormel v. Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 721 (1941) ("Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."). Accordingly, under these authorities and the summary judgment rules, I would vacate the district court's judgment and remand the case to it for further proceedings including a trial or the taking of additional evidence necessary to an informed decision of these questions.

Harris County argues that the FLSA authorizes public agencies to unilaterally force employees to reduce periodically





their accrued compensatory time by taking off regular work days to prevent employees from demanding monetary compensation for any overtime hours worked after the statutory maximums are reached or cashing in large amounts of compensatory time upon their retirement or termination. The FLSA does not expressly give public agencies this right. The County, however, contends that because it has the right under §207(o)(3)(B), at any time, to reduce or eliminate an employee's accrued compensatory time, by paying the employee for that time at the employee's current regular rate of pay, the statute clearly implies that it may also reduce it by requiring an employee to use accrued compensatory time involuntarily (i.e., by not working hours for which the employee is compensated at the employee's regular rate. §207(o)(7)). The majority embraces and rearticulates the County's argument as follows:

> The statute recognizing public employers' ability to pay down accrued comp time, 29 U.S.C. § 207(o)(3)(B), equally reflects Congressional intent to permit employers to control the accrual of comp time.

Maj.Op.p.8 (footnote omitted).

In addition to not being persuasive, this approach fails to give proper deference to the Secretary's interpretation of the statute. The provision relied upon, §207(o)(3)(B), provides: "If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment." Although an agency can reduce an employee's accrued compensatory time by paying for that time in cash, it does not necessarily follow that an employer can unilaterally

require an employee to reduce accrued compensatory time by taking time off at regular pay.

Recognizing the unique fiscal burden that compliance with the FLSA would present to public agencies, the 1985 amendments to the FLSA permit only public agencies to compensate employees for overtime with compensatory time instead of cash payments. Congress did not intend, however, to allow public agencies to indefinitely replace monetary overtime compensation with compensatory time, undoubtedly an inferior substitute for cash. The statute clearly requires that any employee who has accrued 480 or 240 hours, as the case may be according to the category of employment, of compensatory time be paid overtime compensation in cash for additional overtime hours of work. §207(o)(3)(A). If Congress had intended to allow employers to permanently avoid the obligation of providing monetary compensation for overtime hours, it would not have imposed these statutory maximums on the amount of compensatory time the employer may award. The provision allowing employers to reduce the amount of accrued compensatory hours by paying monetary compensation does not reflect an intent to allow employers to unilaterally force employees to consume accrued compensatory time without any concession to the employees' desires; instead, it simply provides employers with the option to decrease compensatory time balances by paying cash — the usual and superior form of overtime compensation.

Moreover, the FLSA expressly provides that an employee of a public agency who has accrued compensatory time off and has requested the use of such compensatory time shall be permitted by the agency to use such time within a reasonable period after making the request if the use of the compensatory



time does not unduly disrupt the operations of the agency. § 207(o)(5). Accordingly, even if an agency can on its own initiative redeem compensatory time commitments for cash (the preferred form of compensation) at the employee's current regular rate of pay, it simply does not follow that an agency can also unilaterally make the employee's compensatory time an even less desirable substitute for cash overtime pay by depriving the employee of the choice of when and how to use it, but instead dictating the manner of its usage without regard to the desires or convenience of the employee.

Construing the statute in accordance with the Secretary's regulations does not deprive employers of all control of employee compensatory time balances. Employers may enter into an agreement with employees (or their representatives) concerning the preservation, use, and cashing out of compensatory time provided that these such agreements are consistent with section 7(o) of the FLSA. In addition, the regulations specifically allow employers to reduce these balances by paying cash for the accrued compensatory hours. Finally, as the Eighth Circuit noted in *Heaton v. Moore*, 43 F.3d 1176, 1181 (8th Cir. 1994), employers can always schedule less overtime or hire additional workers to decrease the rate of accrual of compensatory time.

**APPENDIX B — OPINION ON SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS DATED AND FILED NOVEMBER 25, 1996**

**Lynwood MOREAU, et al, Plaintiffs,**

**v.**

**HARRIS COUNTY, et al., Defendants.**

**Civil Action No. H-94-1427.**

United States District Court,
S.D. Texas

Nov. 25, 1996

* * *

OPINION ON SUMMARY JUDGMENT

HUGHES, District Judge.

1. Introduction.

Harris County employees sued it for forcing them to use their accumulated compensatory time at its convenience. County supervisors compelled employees to use their accrued time when their balances approached a set level. Accumulated time credits cannot be managed differently than salary; employees have a right to use it when they choose.



*Appendix B*

2. Accumulation.

The Harris County Sheriff's department has determined a maximum level for accumulated time credits. The level varies among competent sections within the department. The maximum hours that may be maintained is set by each bureau commander based on assessments of its personal requirements. When an employee's accumulated time approaches that level, the employee is asked to decrease it. If he does not comply promptly, the supervisor orders him to do it. Dissatisfied employees may complain informally within the department hierachy.

3. Fair Labor Standards Act.

Public employers may pay their employees for overtime by awarding time off at the rate of one and one-half hours for each hour. 29 U.S.C. § 207(o) (1992). Governments are allowed to substitute time off for cash as compensation, but the time credits need to be as nearly equivalent to cash as possible; the time off must be consumable by the worker on the worker's terms. Heaton v. Moore, 43 F.3d 1176 (8th Cir.1994), cert. denied, Schriro v. Heaton, __ U.S. __, 115 S.Ct. 2249, 132 L.Ed.2d 257 (1995).

Federal law limits maximum accrued time to 240 or 480 hours, depending on the type of work an employee does. Employees must be paid cash for additional hours. The workers in this case have not yet secured 240 hours. The function of the county limits is to force workers to take time off rather than to keep working and receive cash for later overtime.

4. Public Administration.

If the government finds it inconvenient to schedule around employees taking their compensatory time, it is always free to switch to cash compensation at the premium rate that other employers have to bear. If the government finds it inconvenient to pay workers who reach the statutory limit the cash premium required by federal law, it is always free to hire additional workers, lowering the hours worked by each. This spreading of economic opportunity was among the social policies that led to the wage and hour laws in the first place. See generally Learned Hand, Due Process of Law and the Eight-Hour Day, 21 HARV.L.REV. 495 (1908); Lonnie Golden, The Economics of Worktime Length, Adjustment, and Flexibility: a Synthesis of Contributions from the Competing Models of the Labor Market, REV.SOC.ECON., Mar. 1, 1996.

Limiting accumulated time might otherwise be a reasonable management technique, but federal law says a worker cannot be made to bear the burden of the government's allocation of its resources. The way for public employers to control the use of compensatory time is for them to control its being generated in the first place.

5. Extortionate Consumption.

A public employer may exercise control over an employee's use of compensatory time only when the employee's requested use of that time would disrupt the employer's operations. An employee could attempt to extort concessions from her employer by taking compensatory time at a time when her presence is critical to the operation, but no suggestion has been made that the sheriff's office has been the victim of abusive





workers. Frankly, it is difficult to imagine this argument being serious.

Although an employer may establish reasonable restrictions on vacations, sick leave, and other time-off forms of compensation, it cannot evade its statutory obligation for extra pay for overtime work, even when the statute allows the extra pay to be in the form of time off. Compensatory time is far less amenable to management adjustment than the others because the time off is in place of cash pay required by statute.

6. Conclusion.

Compensatory time, like overtime, causes management problems, including taxpayer reactions. The government and its managers must solve those problems without imposing on the statutorily-protected rights of the workers.

## APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS DATED JULY 25, 1997 AND ENTERED JULY 28, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CIVIL ACTION H-94-1427

LYNWOOD MOREAU, *et al.*,

Plaintiffs,

*versus*

HARRIS COUNTY, TEXAS, *et al.*,

Defendants.

Final Judgment

1. Harris County may not force employees to use their accumulated compensatory time without violating the Fair Labor Standards Act.

2. The parties plaintiff are awarded attorney's fees of $21,360 from Harris County.

Signed July 25, 1997, at Houston, Texas.

s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge



## APPENDIX D — STIPULATION DATED AND ENTERED JULY 28, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-94-1427

LYNWOOD MOREAU,

*Plaintiff*,

V.

HARRIS COUNTY,

*Defendant*.

### STIPULATION

It is hereby stipulated by and between the parties that the following is a true and accurate description of the policy of the Harris County Sheriff's Department regarding compulsory use of accumulated compensatory time:

Harris County personnel regulations provide for the payment of compensatory time off for its employees in accordance with the Fair Labor Standards Act. It is the policy of the Harris County Sheriff's Department that the compensatory time of employees, who for purposes of the Fair Labor Standards Act are considered non-exempt, will be maintained below a predetermined maximum level. Pursuant to this policy, each Bureau Commander determines the maximum number of compensatory hours that may be maintained by the employees in his or her bureau. Such determination is based upon an assessment of the personnel

*Appendix D*

requirements of the particular bureau. Whenever it appears that an employee has accumulated compensatory hours which approach the maximum allowable number of compensatory hours authorized by the Fair Labor Standards Act, the employee is advised that he or she is nearing the maximum number and is requested to voluntarily take steps to begin reducing the number of accumulated compensatory hours. If the employee does not voluntarily take steps to reduce the accumulated hours within a reasonable time, the employee's supe visor is authorized to order the employee to reduce his or her accumulated compensatory time. While the Department attempts to arrange mutually agreeable times for the employee to utilize his or her accumulated compensatory time, an agreement cannot always be reached between the employee and the supervisor. In that event, the supervisory personnel are authorized by the Department to issue an order directing the employee to utilize compensatory time at a time or times that will best serve the personnel requirements of the bureau. If the employee is dissatisfied with the supervisor's order, he or she may complain to higher levels of supervision within the Department on an informal basis.

Respectfully submitted,

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*Appendix D*

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## APPENDIX E — FAIR LABOR STANDARDS ACT OF 1938, § 7(o)-(q), 29 U.S.C.A. § 207(o)-(q)

§ 207 Maximum Hours

* * *

(o) Compensatory time.

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only —

(A) pursuant to —

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable





to the employee prescribed by paragraph (3). In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

*Appendix E*

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than —

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee, whichever is higher [.]

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency —

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) if —

(A) such employee is paid at a per-page rate which is not less than —



*Appendix E*

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection —

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which

an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution.

(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency —

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or





(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

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(q) Maximum hour exemption for employees receiving remedial education.

> Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is —
>
> (1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;
>
> (2) designed to provide reading and other basic skills at an eighth grade level or below; and
>
> (3) does not include job specific training.

* * * *



## APPENDIX F — REGULATIONS INVOLVED

### 29 C.F.R. § 553.20

SECTION 7(o) — COMPENSATORY TIME AND COMPENSATORY TIME OFF

**§ 553.20 Introduction.**

> Section 7 of the FLSA requires that covered, nonexempt employees receive not less than one and one-half times their regular rates of pay for hours worked in excess of the applicable maximum hours standards. However, section 7(o) of the Act provides an element of flexibility to State and local government employers and an element of choice to their employees or the representatives of their employees regarding compensation for statutory overtime hours. The exemption provided by this subsection authorizes a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, to provide compensatory time off (with certain limitations, as provided in § 553.21) in lieu of monetary overtime compensation that would otherwise be required under section 7. Compensatory time received by an employee in lieu of cash must be at the rate of not less than one and one-half hours of compensatory time for each hour of overtime work, just as the monetary rate for overtime is calculated at the rate of not less than one and one-half times the regular rate of pay.

*Appendix F*

## 29 C.F.R. § 553.21

### § 553.21 Statutory provisions.

Section 7(o) provides as follows:

(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only —

(A) Pursuant to —

(i) Applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) In the case of employees not covered by subclause (i), an agreement or understanding arrived at between the



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employer and employee before the performance of the work; and

(B) If the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may

accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than —

(A) The average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) The final regular rate received by such employee, whichever is higher.

(5) An employee of a public agency which is a State, political subdivision of



a State, or an interstate governmental agency —

(A) Who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) Who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) For purposes of this subsection —

(A) The term *overtime compensation* means the compensation required by subsection (a), and

(B) The terms *compensatory time* and *compensatory time off* means hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

* * *

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**29 C.F.R. § 553.22**

**§ 553.22 "FLSA compensatory time" and "FLSA compensatory time off".**

(a) Compensatory time and compensatory time off are interchangeable terms under the FLSA. Compensatory time off is paid time off the job which is earned and accrued by an employee in lieu of immediate cash payment for employment in excess of the statutory hours for which overtime compensation is required by section 7 of the FLSA.

(b) The Act requires that compensatory time under section 7(o) be earned at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by section 7 of the FLSA. Thus, the 480-hour limit on accrued compensatory time represents not more than 320 hours of actual overtime worked, and the 240-hour limit represents not more than 160 hours of actual overtime worked.

(c) The 480- and 240-hour limits on accrued compensatory time only apply to overtime hours worked after April 15, 1986. Compensatory time which an employee has accrued prior to April 15, 1986, is not subject to the overtime requirements of the FLSA and need not be aggregated with compensatory time accrued after that date.



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**29 C.F.R. 553.23**

**§ 553.23 Agreement or understanding prior to performance of work.**

(a) *General.* (1) As a condition for use of compensatory time in lieu of overtime payment in cash, section 7(o)(2)(A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees. If the employees do not have a representative, compensatory time may be used in lieu of cash overtime compensation only if such an agreement or understanding has been arrived at between the public agency and the individual employee before the performance of work. No agreement or understanding is required with respect to employees hired prior to April 15, 1986, who do not have a representative, if the employer had a regular practice in effect on April 15, 1986, of granting compensatory time off in lieu of overtime pay.

(2) Agreements or understandings may provide that compensatory time off in lieu of overtime payment in cash may be restricted to certain hours of work only. In addition, agreements or understandings may provide for any combination of compensatory time off and overtime payment in cash (e.g., one hour compensatory time credit plus

one-half the employee's regular hourly rate of pay in cash for each hour of overtime worked) so long as the premium pay principle of at least "time and one-half" is maintained. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act. To the extent that any provision of an agreement or understanding is in violation of section 7(o) of the Act, the provision is superseded by the requirements of section 7(o).

(b) *Agreement or understanding between the public agency and a representative of the employees.* (1) Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. Any agreement must be consistent with the provisions of section 7(o) of the Act.

(2) Section 2(b) of the 1985 Amendments provides that a collective bargaining agreement in effect on April 15, 1986, which permits compensatory time off in lieu of overtime



compensation, will remain in effect until the expiration date of the collective bargaining agreement unless otherwise modified. However, the terms and conditions of such agreement under which compensatory time off is provided after April 14, 1986, must not violate the requirements of section 7(o) of the Act and these regulations.

(c) *Agreement or understanding between the public agency and individual employees.* (1) Where employees of a public agency do not have a recognized or otherwise designated representative, the agreement or understanding concerning compensatory time off must be between the public agency and the individual employee and must be reached prior to the performance of work. This agreement or understanding with individual employees need not be in writing, but a record of its existence must be kept. (See § 553.50.) An employer need not adopt the same agreement or understanding with different employees and need not provide compensatory time to all employees. The agreement or understanding to provide compensatory time off in lieu of cash overtime compensation may take the form of an express condition of employment, provided (i) the employee knowingly and voluntarily agrees to it as a condition of employment and (ii) the employee is informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section 7(o) of the Act. An agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be

given in lieu of overtime pay. In such a case, an agreement or understanding would be presumed to exist for purposes of section 7(o) with respect to any employee who fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay. However, the employee's decision to accept compensatory time off in lieu of cash overtime payments must be made freely and without coercion or pressure.

(2) Section 2(a) of the 1985 Amendments provides that in the case of employees who have no representative and were employed prior to April 15, 1986, a public agency that has had a regular practice of awarding compensatory time off in lieu of overtime pay is deemed to have reached an agreement or understanding with these employees as of April 15, 1986. A public agency need not secure an agr ement or understanding with each employee em, ed prior to that date. If, however, such a regula actice does not conform to the provisions of section 7(o) of the Act, it must be modified to do so with regard to practices after April 14, 1986. With respect to employees hired after April 14, 1986, the public employer who elects to use compensatory time must follow the guidelines on agreements discussed in paragraph (c)(1) of this section.

* * *



## 29 C.F.R. § 553.24

### § 553.24 "Public safety", "emergency response", and "seasonal" activities.

(a) Section 7(o)(3)(A) of the FLSA provides that an employee of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, may accumulate not more than 480 hours of compensatory time for FLSA overtime hours which are worked after April 15, 1986, if the employee is engaged in "public safety", "emergency response", or "seasonal" activity. Employees whose work includes "seasonal", "emergency response", or "public safety" activities, as well as other work, will not be subject to both limits of accrual for compensatory time. If the employee's work regularly involves the activities included in the 480-hour limit, the employee will be covered by that limit. A public agency cannot utilize the higher cap by simple classification or designation of an employee. The work performed is controlling. Assignment of occasional duties within the scope of the higher cap will not entitle the employer to use the higher cap. Employees whose work does not regularly involve "seasonal", "emergency response", or "public safety" activities are subject to a 240-hour compensatory time accrual limit for FLSA overtime hours which are worked after April 15, 1986.

(b) Employees engaged in "public safety", "emergency response", or "seasonal" activities, who

transfer to positions subject to the 240-hour limit, may carry over to the new position any accrued compensatory time. The employer will not be required to cash out the accrued compensatory time which is in excess of the lower limit. However, the employee must be compensated in cash wages for any subsequent overtime hours worked until the number of accrued hours of compensatory time falls below the 240-hour limit.

(c) "Public Safety Activities": The term "public safety activities" as used in section 7(o)(3)(A) of the Act includes law enforcement, fire fighting or related activities as described in §§ 553.210 (a) and (b) and 553.211 (a)-(c), and (f). An employee whose work regularly involves such activities will qualify for the 480-hour accrual limit. However, the 480-hour accrual limit will not apply to office personnel or other civilian employees who may perform public safety activities only in emergency situations, even if they spend substantially all of their time in a particular week in such activities. For example, a maintenance worker employed by a public agency who is called upon to perform fire fighting activities during an emergency would remain subject to the 240-hour limit, even if such employee spent an entire week or several weeks in a year performing public safety activities. Certain employees who work in "public safety" activities for purposes of section 7(o)(3)(A) may qualify for the partial overtime exemption in section 7(k) of the Act. (See § 553.201)





(d) "Emergency Response Activity": The term "emergency response activity" as used in section 7(o)(3)(A) of the Act includes dispatching of emergency vehicles and personnel, rescue work and ambulance services. As is the case with "public safety" and "seasonal" activities, an employee must regularly engage in "emergency response" activities to be covered under the 480-hour limit. A city office worker who may be called upon to perform rescue work in the event of a flood or snowstorm would not be covered under the higher limit, since such emergency response activities are not a regular part of the employee's job. Certain employees who work in "emergency response" activities for purposes of section 7(o)(3)(A) may qualify for the partial overtime exemption in section 7(k) of the Act. (See § 553.215.)

(e)(1) "Seasonal Activity": The term "seasonal activity" includes work during periods of significantly increased demand, which are of a regular and recurring nature. In determining whether employees are considered engaged in a seasonal activity, the first consideration is whether the activity in which they are engaged is a regular and recurring aspect of the employee's work. The second consideration is whether the projected overtime hours during the period of significantly increased demand are likely to result in the accumulation during such period of more than 240 compensatory time hours (the number available under the lower cap). Such projections will normally be based on the employer's past experience with similar employment situations.

(2) Seasonal activity is not limited strictly to those operations that are very susceptible to changes in the weather. As an example, employees processing tax returns over an extended period of significantly increased demand whose overtime hours could be expected to result in the accumulation during such period of more than 240 compensatory time hours will typically qualify as engaged in a seasonal activity.

(3) While parks and recreation activity is primarily seasonal because peak demand is generally experienced in fair weather, mere periods of short but intense activity do not make an employee's job seasonal. For example, clerical employees working increased hours for several weeks on a special project or assigned to an afternoon of shoveling snow off the courthouse steps would not be considered engaged in seasonal activities, since the increased activity would not result in the accumulation during such period of more than 240 compensatory time hours. Further, persons employed in municipal auditoriums, theaters, and sports facilities that are open for specific, limited seasons would be considered engaged in seasonal activities, while those employed in facilities that operate year round generally would not.

(4) Road crews, while not necessarily seasonal workers, may have significant periods of peak demand, for instance during the snow plowing season or road construction season. The snow plow operator/road crew employee may be able to accrue



compensatory time to the higher cap, while other employees of the same department who do not have lengthy periods of peak seasonal demand would remain under the lower cap.

* * *

**29 C.F.R. § 553.25**

**§ 553.25 Conditions for use of compensatory time ("reasonable period", "unduly disrupt").**

(a) Section 7(o)(5) of the FLSA provides that any employee of a public agency who has accrued compensatory time and requested use of this compensatory time, shall be permitted to use such time off within a "reasonable period" after making the request, if such use does not "unduly disrupt" the operations of the agency. This provision, however, does not apply to "other compensatory time" (as defined below in § 553.28), including compensatory time accrued for overtime worked prior to April 15, 1986.

(b) Compensatory time cannot be used as a means to avoid statutory overtime compensation. An employee has the right to use compensatory time earned and must not be coerced to accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable period of his or her making a request for use of such time.

(c) *Reasonable Period.* (1) Whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff.

(2) The use of compensatory time in lieu of cash payment for overtime must be pursuant to some form of agreement or understanding between the employer and the employee (or the representative of the employee) reached prior to the performance of the work. (See § 553.23.) To the extent that the (conditions under which an employee can take compensatory time off are contained in an agreement or understanding as defined in § 553.23, the terms of such agreement or understanding will govern the meaning of "reasonable period".

(d) *Unduly Disrupt.* When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would



impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

* * *

**29 C.F.R. § 553.26**

**§ 553.26 Cash overtime payments.**

(a) Overtime compensation due under section 7 may be paid in cash at the employer's option, in lieu of providing compensatory time off under section 7(o) of the Act in any workweek or work period. The FLSA does not prohibit an employer from freely substituting cash, in whole or part, for compensatory time off; and overtime payment in cash would not affect subsequent granting of compensatory time off in future workweeks or work periods. (See § 553.23(a)(2).)

(b) The principles for computing cash overtime pay are contained in 29 CFR part 778. Cash overtime compensation must be paid at a rate not less than one and one-half times the regular rate at which the employee is actually paid. (See 29 CFR 778.107.)

(c) In a workweek or work period during which an employee works hours which are overtime hours under FLSA and for which cash overtime payment will be made, and the employee also takes compensatory time off, the payment for such time

off may be excluded from the regular rate of pay under section 7(e)(2) of the Act. Section 7(e)(2) provides that the regular rate shall not be deemed to include

> . . . payments made for occasional periods when no work is performed due to vacation, holiday, . . . or other similar cause.

As explained in 29 CFR 778.218(d), the term "other similar cause" refers to payments made for periods of absence due to factors like holidays, vacations, illness, and so forth. Payments made to an employee for periods of absence due to the use of accrued compensatory time are considered to be the type of payments in this "other similar cause" category.

**29 C.F.R. § 553.27**

**§ 553.27 Payments for unused compensatory time.**

(a) Payments for accrued compensatory time earned after April 14, 1986, may be made at any time and shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(b) Upon termination of employment, an employee shall be paid for unused compensatory time earned after April 14, 1986, at a rate of compensation not less than —



(1) The average regular rate received by such employee during the last 3 years of the employee's employment, or

(2) The final regular rate received by such employee, whichever is higher.

(c) The phrase *last 3 years of employment* means the 3-year period immediately prior to termination. Where an employee's last 3 years of employment are not continuous because of a break in service, the period of employment after the break in service will be treated as new employment. However, such a break in service must have been intended to be permanent and any accrued compensatory time earned after April 14, 1986, must have been cashed out at the time of initial separation. Where the final period of employment is less than 3 years, the average rate still must be calculated based on the rate(s) in effect during such period.

(d) The term "regular rate" is defined in 29 CFR 778.108. As indicated in § 778.109, the regular rate is an hourly rate, although the FLSA does not require employers to compensate employees on an hourly basis.

* * *

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**29 C.F.R. § 553.28**

**§ 553.28 Other compensatory time.**

(a) Compensatory time which is earned and accrued by an employee for employment in excess of a nonstatutory (that is, non-FLSA) requirement is considered "other" compensatory time. The term "other" compensatory time off means hours during which an employee is not working and which are not counted as hours worked during the period when used. For example, a collective bargaining agreement may provide that compensatory time be granted to employees for hours worked in excess of 8 in a day, or for working on a scheduled day off in a non-overtime workweek. The FLSA does not require compensatory time to be granted in such situations.

(b) Compensatory time which is earned and accrued by an employee working hours which are "overtime" hours under State or local law, ordinance, or other provisions, but which are not overtime hours under section 7 of the FLSA is also considered "other" compensatory time. For example, a local law or ordinance may provide that compensatory time be granted to employees for hours worked in excess of 35 in a workweek. Under section 7(a) of the FLSA, only hours worked in excess of 40 in a workweek are overtime hours which must be compensated at one and one-half times the regular rate of pay.



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(c) Similarly, compensatory time earned or accrued by an employee for employment in excess of a standard established by the personnel policy or practice of an employer, or by custom, which does not result from the FLSA provision, is another example of "other" compensatory time.

(d) The FLSA does not require that the rate at which "other" compensatory time is earned has to be at a rate of one and one-half hours for each hour of employment. The rate at which "other" compensatory time is earned may be some lesser or greater multiple of the rate or the straight-time rate itself.

(e) The requirements of section 7(o) of the FLSA, including the limitations on accrued compensatory time, do not apply to "other" compensatory time as described above.

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# APPENDIX G — HOUSE REPORT ON THE FAIR LABOR STANDARDS AMENDMENTS OF 1985; OCTOBER 24, 1985

99th Congress
*1st Session*

Report
99-331

HOUSE OF REPRESENTATIVES

## FAIR LABOR STANDARDS AMENDMENTS OF 1985

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October 24, 1985.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. HAWKINS, from the Committee on Education and Labor, submitted the following

## REPORT

[To accompany H.R. 3530]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 3530) to amend the Fair Labor Standards Act of 1938 to authorize the provision of compensatory time in lieu of overtime compensation for employees of States, political subdivisions of States, and interstate governmental agencies, to clarify the application of the Act to volunteers, and for other purposes, having considered the same, report favorably thereon with an amendment and recommends that the bill as amended do pass.

* * *



*Appendix G*

## V. COMMENTS ON MAJOR PROVISIONS

### A. COMPENSATORY TIME

Section (2) of the bill amends section 7 of the Act to provide flexibility to state and local government employers and an element of choice to their employees regarding compensation for statutory overtime hours worked by covered employees. The new subsection 7(o), created by this bill, would authorize public employers to provide compensatory time off in lieu of monetary overtime compensation that otherwise would be required by the relevant provisions of section 7 of the Act regarding various types of employees. Compensatory time received by an employee in lieu of cash must be at the premium rate of not less than one and one-half hours of compensatory time for each hour of overtime work, just as the monetary rate for overtime is calculated at the premium rate of not less than one and one-half times the regular rate of pay.

One of the main areas of complaint from many state and local government employers, as well as some groups of employees, was the general prohibition against awarding compensatory time off for overtime work in lieu of monetary compensation. The Fair Labor Standards Act customarily has been interpreted by the Secretary of Labor as precluding the use of compensatory time for statutory overtime hours. In addition, consistent with the purposes of the Fair Labor Standards Act, the obligation to compensate employees at the rate of time and one-half created a financial incentive for employers to reduce hours and hire more employees whereas the widespread use of non-premium compensatory time would frustrate the achievement of these objectives.

Previously, as noted in this report, compensatory time within the framework of the Act was limited to compensatory time off within the same pay period, usually to ensure that the employee did not exceed the maximum of

straight time hours permitted under section 7 of the Act. Existing compensatory time systems have also operated within the so called "gap time" between contractual obligations to pay overtime and the requirements of the statute. While "gap time" compensatory time could be accumulated and held beyond the immediate pay period as stipulated in the regulations promulgated by the Secretary of Labor and found at 29 CFR 553.19, these arrangements were nevertheless much more restricted than most traditional compensatory time systems.

While the Committee appreciates the employee protection principles and job creation purposes of the overtime provision of the Fair Labor Standards Act, it also recognizes the mutual benefits arising from a number of situations where state and local government employees and their employers have had agreements or longstanding arrangements where compensatory time off was provided for overtime hours worked by the employees. The *Garcia* decision and with it the re-application of the Fair Labor Standards Act to most public employees effectively ended most traditional compensatory time systems. It, therefore, eliminated the freedom and flexibility enjoyed by public employees and the additional options such systems have provided to the public employer faced with extraordinary demands for public services yet constrained by strict limits on available revenue.

Keeping in mind the fundamental protections afforded to employees under the Fair Labor Standards Act, the Committee concludes that compensatory time should be available to state and local government workers and their employers under certain conditions. Accordingly, a new subsection 7(o) is added to the Fair Labor Standards Act to provide state and local government employees with the opportunity to be compensated for overtime hours with compensatory time off in lieu of monetary compensation. Compensatory time would be allowed pursuant to an agreement entered into between the employers or their representative and the employer prior to the performance of the overtime work, or with prior notice to the em-



ployees, provided that the hours for compensatory time granted in lieu of cash are compensated at the premium rate of not less than one and one-half hours for each hour of overtime work. The Committee encourages employers and employees to enter into such mutual agreements to the extent possible.

*1. Agreement or understanding*

The use of compensatory time in lieu of cash must be pursuant to some form of agreement or understanding between the employer and employee, or notice to the employee, prior to the performance of the work. Where employees have selected a representative, which need not be a formal or recognized collective bargaining agent as long as it is a representative designated by the employees, the agreement or understanding must be between the representative and the employer, either through collective bargaining or through a memorandum of understanding or other type of agreement. Where employees do not have a representative, the agreement or understanding must be between the employer and the individual employee.

The agreement or bilateral understanding to provide time off as compensation for overtime may take the form of an expressed condition of employment, so long as (1) the employee knowingly agrees to it as a condition of employment, and (2) the employee is informed that the compensatory time received may be preserved, used, or cashed out consistent with the provisions of this new subsection. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as those provisions are consistent with this subsection and the remainder of the Act.

In the case of employees who have no representative and were employed prior to April 15, 1986, an employer that has had a regular practice of awarding compensatory time in lieu of overtime pay shall be deemed to have

reached an agreement or understanding with these employees as of April 15, 1986. The primary purpose of this provision is to protect those pre-existing practices where employees and employers have utilized compensatory time instead of cash payments for overtime work. The Committee does not intend that employers who have had such a regular practice be required to secure an agreement or understanding with each employee prior to the effective date of this subsection.

If, however, a regular practice of awarding compensatory time to employees without a representative does not conform to the remaining requirements of this subsection, it must be modified to do so by April 15, 1986. A practice of awarding compensatory time in lieu of overtime pay initiated by an employer between the date of enactment and April 15, 1986 would not be a regular practice of sufficient duration to permit the employer to avoid the obligation to enter into an agreement or understanding with, or providing prior notice to, the affected employees.

As mentioned above, the compensatory time provisions are designed to allow the preservation of regular past practices that have proved mutually beneficial to employees and employers, and to afford the parties the opportunity to enter into appropriate agreements allowing the acceptance of compensatory time rather than cash payments.

*2. Preservation, use, and cashing out*

The Committee has sought to balance the employee's right to make use of compensatory time that has been earned and the employer's interests in avoiding a disruption in operations. An employee whose work includes on a regular or recurring basis public safety activity, emergency response activity, or seasonal activity may accrue a maximum of 480 hours of compensatory time. Employees performing work in other activities may ac-





crue compensatory time up to a maximum of 180 hours. Hours accrued prior to April 15, 1986, do not count toward these limits. The 480 hour limit represents 320 hours of actual overtime worked, and the 180 hour limit represents 120 hours of actual ovetime worked, times the one and one-half premium rate. Once these limits are reached, an employee either must be paid in cash for additional accrued hours or else must use some compensatory time before any additional overtime hours may be compensated in the form of compensatory time off. For example, if a law enforcement employee with 480 accrued hours received compensation for 30 of these hours, either in the form of cash or time off, the employee may work another 20 hours of overtime and thus accrue another 30 hours at the premium rate. But if that employee has accrued 480 hours and then works additional overtime before drawing down that accrued amount, such additional overtime must be compensated in cash. The presence of a limit on the number of accrued hours does not mean that all 480 or 180 hours must be accrued before compensatory time may be used.

The Committee does not intend that employees whose work includes seasonal, emergency response or public safety activity as well as other work be subject to two different limits on accruable compensatory time. As long as the employee's work regularly includes the activities included in the higher cap, the employee will be covered by the higher cap. The Committee does not expect to find that after the enactment of these amendments local government employees are suddenly reclassified with additional designations as emergency personnel. Similarly, the Committee assumes that local government administrators will resist the temptation to assign their clerical employees or their support staff to an afternoon of shoveling snow on the courthouse steps or a day with the ambulance crew simply to bump the compensatory time cap to the higher level. The Committee expects good faith compliance by public employers and would direct the Secretary

of Labor to enforce these amendments so as to prevent such attempts to evade Congressional intent.

Considerable focus has been given to the question of seasonal activity. Seasonal activity is not limited strictly to those operations that are very susceptible to changes in the weather. Obviously, parks and recreation activity in general are primarily seasonal since they experience peak demand during fair weather seasons or other sport seasons and largely dormant periods at other times. Road crews, while not necessarily seasonal workers, may nevertheless have significant periods of peak demand, for instance during the snow plowing or road construction season. In such an instance the snow plow operator/road crew employee would be able to accrue compensatory time to the higher cap, while other employees of the same department who do not have lengthy periods of peak seasonal demand would remain under the lower cap. Auditoriums, theaters, and sports facilities that are open for specific limited seasons, would meet a seasonal test, facilities that operate year round would not. Mere periods of short but intense activity do not make an employee's job seasonal in nature; therefore, clerical employees working increased hours for several weeks on a city budget or processing insurance forms or tax notices would not need the higher compensatory time cap since the limited periods of increased activity could be accommodated within the lower limit. In determining which employees would be considered seasonal, the Secretary of Labor should first determine whether the "seasonal activity" is a regular and recurring aspect of the employees' work and then whether the projected overtime hours during the "season" of significantly increased demand exceeds the number of compensatory time hours available under the lower cap.

Regardless of the number of hours accrued, the employee has the right to be paid for or use accrued compensatory time subject to this subsection. It is expected that the rate of compensation for cashing out accrued



compensatory time shall be at the presumably higher rate earned by the employee at the time the cashing out takes place. Because an employee's rate of pay is likely to increase over a period of time in most employment situations, it is anticipated that many employers will have a fiscal incentive to allow for the use of accrued compensatory time.

The right to be paid arises no later than the time of termination from employment. By termination, the Committee intends to include situations in which the employee is separated from a job voluntarily (including retirement), is terminated by an employer, dies, or otherwise leaves a job. At a minimum, the employee is entitled to be paid for the usual compensatory time at a rate not less than the average rate received by such employee during the last three years of the employee's employment. It is understood that an employer may not decrease an employee's rate of pay in order to avoid or undermine the intent of this cash-out provision.

The employee also has the right to use some or all of accrued compensatory time within a reasonable period after requesting such use, provided that this does not unduly disrupt the employer's operations. Use of the term "reasonable" is intended to accommodate varying work practices based on the facts and circumstances of each case. When an employer receives such a request for the use of compensatory time, that request should be honored unless to do so would be unduly disruptive. By the term "unduly disrupt," the Committee means something more than mere inconvenience. For example, a request by a snow plow operator in Vermont to use 40 hours of compensatory time in February probably would be unduly disruptive. This would be true whether the request was made 48 hours or several months in advance. On the other hand, the same request by the same employee for the same number of hours in June or hunting season probably would not be unduly disruptive.

*Appendix G*

The Committee is very concerned that public employees in offices with regular year-round functions, short staff, and steady demands will be urged to accrue many hours of compensatory time and then encounter difficulty in being able to make beneficial use of the accumulated compensatory time. It is the Committee's views that an employee should not be coerced to accept more compensatory time in lieu of overtime pay in a year than an employer realistically and in good faith expects to be able to grant to that employee if he or she requests it within a similar period. To do otherwise would permit public employers to enjoy the fruits of the overtime labor of the employees without having to pay the overtime premium required by the Act. Clearly, compensatory time is not envisioned as a means to avoid overtime compensation. It is merely an alternative method of meeting that obligation. Where public employers find that they cannot make requested time off available even outside of the periods of increased demand that all public service operations experience in the course of their business, they should consider allowing employees to cash out requested but unavailable compensatory time. For those employees where the problem of disruption is persistent, compensatory time should not be the preferred method of compensation for overtime work.

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## APPENDIX H — SENATE REPORT ON THE FAIR LABOR STANDARDS PUBLIC EMPLOYEE OVERTIME COMPENSATION ACT; OCTOBER 17, 1985

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Calendar No. 348

99th Congress
1st Session

Report
99-159

SENATE

FAIR LABOR STANDARDS PUBLIC EMPLOYEE OVERTIME COMPENSATION ACT

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OCTOBER 17, (legislative day, OCTOBER 15), 1985).—
Ordered to be printed

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Mr. HATCH, from the Committee on Labor and Human Resources, submitted the following

REPORT

[To accompany S. 1570]

The Committee on Labor and Human Resources, to which was referred the bill (S. 1570) to amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the application of the Act to volunteers, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended to pass.

* * *

*Appendix H*

NEED FOR THE BILL

In seeking to guarantee a minimum standard of living for all working Americans, the FLSA has been heralded as one of our most fundamental efforts to direct economic forces into social desirable channels. By 1974, FLSA coverage extended to three-fourths of the nation's employed nonsupervisory labor force; federal, state and local government employees were the only major exceptions. Federal workers now have been protected for more than a decade, but most state and local government employees only became covered as of the Supreme Court's *Garcia* decision in February 1985. The Committee is not retreating from the principles established by Congress in the 1966 and 1974 FSLA amendments. The rights and protections accorded to employees of the Federal government and the private sector also are extended to employees of states and their political subdivisions.

At the same time, it is essential that the particular needs and circumstances of the States and their political subdivisions be carefully weighed and fairly accommodated. As the Supreme Court stated in *Garcia*, "the States occupy a special position in our constitutional system." Under that system, Congress has the responsibility to ensure that federal legislation does not undermine the States' "special position" or "unduly burden the States." In reporting this bill, the Committee seeks to discharge that responsbility and to further the principles of cooperative federalism.

In particular, in the wake of *Garcia*, the States and their political subdivisions have identified several respects in which they would be injured by immediate application of the FLSA. This legislation responds to these concerns by adjusting certain FLSA principles with respect to employees of states and their political subdivisions and by deferring the effective date of certain provisions of the FLSA insofar as they apply to the States and their political subdivisions.



*Appendix H*

The Committee recognizes that the financial costs of coming into compliance with the FLSA—particularly the overtime provisions of section 1—are a matter of grave concern to many states and localities. We have received extensive testimony on this subject from representatives of state and local governments and organized labor. Although the testimony reflects sharp disagreements as to the nature and context of FLSA compliance costs, the Committee concludes that states and localities required to comply with the FLSA will be forced to assume additional financial responsibilities which in at least some instances could be substantial.

Jurisdictions that had relied for a decade upon the exemptions accorded under *National League of Cities* would be required to meet FLSA standards immediately under *Garcia*. Although many jurisdictions commendably and successfully have undertaken to do so, others have expressed an urgent need for lead-time in which to reorder their budgetary priorities while maintaining fiscal stability. As the Committee did under the 1974 amendments, it has again allowed for lead-time for state and local governmnets to comply with the FLSA requirements.

The Committee also is cognizant that many state and local government employers and their employees voluntarily have worked out arrangements providing for compensatory time off in lieu of pay for hours worked beyond the normally scheduled workweek. These arrangements —frequently the result of collective bargaining—reflect mutually satisfactory solutions that are both fiscally and socially responsible. To the extent practicable, we wish to accommodate such arrangements.

* * *

*Appendix H*

## VI. Committee Views

### A. COMP TIME

A new subsection 7(o) is added to the FLSA to allow state and local government employees to be compensated for overtime hours with compensatory time off ("comp time") in lieu of monetary compensation. Hours for comp time granted in lieu of cash must be compensated at the premium rate of not less than one and one-half hours for each hour of overtime work, just as the monetary rate for overtime is calculated at the premium rate of not less than one and one half times the regular rate of pay.

*1. Agreement or understanding*

The use of comp time in lieu of pay must be pursuant to some form of agreement or understanding between the employer and employee, reached prior to the performance of the work. Where employees have a recognized representative, the agreement or understanding must be between that representative and the employer, either through collective bargaining or through a memorandum of understanding or other type of agreement. Where employees do not have a recognized representative, the agreement or understanding must be between the employer and the individual employee. The agreement or understanding need not be in writing, but a record of its existence must be kept. An employer need not adopt the same method or procedure when reaching such agreement or understanding with different employees. The agreement or understanding to provide time off as compensation for overtime may take the form of an express condition of employment, so long as (i) the employee knowingly and



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voluntarily agrees to it as a condition of employment, and (ii) the employee is informed that the comp time received may be preserved, used, or cashed out consistent with the provisions of this new subsection. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of comp time so long as those provisions do not conflict with this subsection or the remainder of the Act.

In the case of employees who have no recognized representative and were employed prior to April 15, 1986, an employer that has had a regular practice of awarding comp time in lieu of overtime pay shall be deemed to have reached an agreement or understanding with these employees as of April 15, 1986. The Committee does not intend that employers who have had such a regular practice be required to secure an agreement or understanding with each employee employed prior to the effective date of this subsection. If, however, a regular practice of awarding comp time to employees without a recognized representative does not conform to the remaining requirements of this subsection, it must be modified to do so by April 15, 1986. Employers may initiate a regular practice of awarding comp time in lieu of overtime pay between the date of enactment and April 15, 1986, so long as that practice is a regular one and is not intended to avoid or undermine the provisions of this subsection.

*2. Preservation, use, and cashing out*

The Committee has sought to balance the employee's right to make use of comp time that has been earned and the employer's need for flexibility in operations. An employee may accrue a maximum of 480 hours of comp time. (Hours accrued prior to April 15, 1986 do not count toward this limit). The 480 hour limit represents 320 hours of actual overtime worked times the one and one-half premium rate. Once this limit is reached, an employee either must be paid in cash for some of the accrued hours

or else must use some comp time before any additional overtime hours may be compensated in the form of time off. For example, if an employee with 480 accrued hours received compensation for 30 of these hours, either in the form of cash or time off, the employee may work another 20 hours of overtime and thus accrue 30 hours at the premium rate. But if an employee has accrued 480 hours and then works additional overtime before drawing down that accrued amount, such additional overtime must be compensated in cash. The presence of a limit on the number of accrued hours does not mean that all 480 hours must be accrued before comp time may be used.

Regardless of the number of hours accrued, the employee has the right to be paid for or use accrued comp time subject to this subsection. The right to be paid arises no later than the time of termination from employment. By termination, the Committee intends to include situations in which the employee leaves his job voluntarily (including retirement), is terminated by his employer, or dies. The rate of compensation for cashing out accrued comp time shall be the rate earned by the employee at the time the cashing out takes place. Because an employee's rate of pay is likely to increase over a period of time in most employment situations, it is anticipated that many employers will have a fiscal incentive to allow for the use of accrued comp time. It is understood that an employer may not decrease an employee's rate of pay in order to avoid or undermine the intent of this cash-out provision.

The employee also has the right to use some or all of his accrued comp time within a reasonable period after requesting such use, provided that this does not unduly disrupt the employer's operation. Use of the term "reasonable" is intended to accommodate varying work practices based on the facts and circumstances of each case. When an employer receives such a request for the use of comp time, that request should be honored unless to do



so would be unduly disruptive. By "unduly disruptive", the Committee means something more than mere inconvenience. For example, a request by a snow plow operator in Maine to use 40 hours of comp time in February probably would be unduly disruptive. This would be true whether the request was made 48 hours or several months in advance. On the other hand, the same request by the same employee for the same number of hours in June would not be unduly disruptive.

* * *

# APPENDIX I — CONFERENCE REPORT ON THE FAIR LABOR STANDARDS AMENDMENTS OF 1985; NOVEMBER 1, 1985

99th Congress *1st Session* | HOUSE OF REPRESENTATIVES | Report 99-357

## FAIR LABOR STANDARDS AMENDMENTS OF 1985

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NOVEMBER 1, 1985.—Ordered to be printed

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Mr. HAWKINS, from the committee of conference, submitted the following

## CONFERENCE REPORT

[To accompany S. 1570]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 1570) to amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the application of that Act to volunteers, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

* * *



*Appendix 1*

### PAYMENT FOR COMPENSATORY TIME UPON TERMINATION OF EMPLOYMENT

The Senate bill provides that upon termination of employment an employee shall be paid for unused compensatory time at the final regular rate received by such employee.

The House amendment provided that payment for unused compensatory time is to be at a rate not less than the average regular rate received by an employee during the last 3 years of the employee's employment.

The conference substitute combines the Senate and House provisions to provide that payment for unused compensatory time is to be at a rate not less than—

(1) the average regular rate received by an employee during the last 3 years of the employee's employment, or

(2) the final regular rate received by an employee, whichever is higher.

### SCOPE OF SUBSTITUTION RULE

Under the Senate bill the rules for the treatment of hours of substitute employment apply to employees of a public agency engaged in the same activity.

Under the House amendment the rules for the treatment of hours of substitute employment apply only to employees engaged in fire protection or law enforcement activities (including activities of security personnel in correctional institutions).

The conference substitute is the same as the Senate bill.

*Appendix I*

COMPENSATORY TIME LIMIT

Under the Senate bill an employee may not accrue more than 480 hours of compensatory time.

Under the House amendment if the work of an employee included work in a public safety activity, an emergency response activity, or a seasonal activity the employee may accrue not more than 480 hours of compensatory time. An employee engaged in any other work may accrue not more than 180 hours of compensatory time.

The conference substitute provides that if the work of an employee included work in a public safety activity, an emergency response activity, or a seasonal activity the employee may accrue not more than 480 hours of compensatory time. An employee engaged in any other work may accrue not more than 240 hours of compensatory time.

* * *



## APPENDIX J — REGULATIONS FOR THE IMPLEMENTATION OF SECTIONS 2, 3, 4, 5, AND 6 OF THE FAIR LABOR STANDARDS AMENDMENTS OF 1985 APPLICABLE TO EMPLOYEES OF STATE AND LOCAL GOVERNMENTS

DEPARTMENT OF LABOR
Wage and Hour Division Employment
Standards Administration
AGENCY: Wage and Hour Division, Employment
Standards Administration, Labor.

29 CFR Part 553
Application of the Fair Labor Standards Act to
Employees of State and Local Governments

52 FR 2012

Friday, January 16, 1987

ACTION: Final rule.

SUMMARY: This document provides the final text of regulations for the implementation of sections 2, 3, 4, 5, and 6 of the Fair Labor Standards Amendments of 1985 (Pub. L. 99-150) applicable to employees of State and local governments. Existing 29 CFR Part 553 has been restructured and retitled "Application of the Fair Labor Standards Act to Employees of State and Local Governments."

Subpart A contains rules on certain statutory exclusions and exemptions, compensatory time provisions, and special recordkeeping requirements applicable to State and local governments and their employees.

* * *

*Appendix J*

EFFECTIVE DATE: February 17, 1987.

FOR FURTHER INFORMATION CONTACT: Herbert J. Cohen, Deputy Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210, Telephone (202) 523-8305. (This is not a toll-free number.)

TEXT: SUPPLEMENTARY INFORMATION: On April 18, 1986, the Department of Labor published in the Federal Register (51 FR 13402) proposed regulations to implement the changes in the Fair Labor Standards Act (FLSA or Act) resulting from the 1985 Amendments.

These Amendments, which were enacted on November 13, 1985, changed certain provisions of the FLSA as they relate to employees of State and local governments. The legislation was enacted following the decision by the U.S. Supreme Court in Garcia v. San Antonio Metropolitan Transit Authority et al. (Garcia), 105 S.Ct. 1005 (February 19, 1985) which held that the FLSA may constitutionally be applied to State and local governments. The Amendments responded to many of the concerns expressed by representatives of many State and local government employer and employee organizations who identified areas in which they believed the application of the FLSA would have adverse effects.

The 1985 Amendments amended the FLSA by including special provisions applicable to State and local government agencies and their employees. The amended Act permits such agencies to grant compensatory time off with pay in lieu of cash overtime wages to their employees under certain



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conditions, permits the exclusion of certain hours of work in calculating overtime compensation for employees who work for two separate employers or in two separate capacities for the same employer, and provides special standards by which volunteers for public agencies are excluded from the Act's coverage (and, therefore, from the FLSA's minimum wage and overtime pay requirements) provided they receive no compensation other than reimbursement for expenses, reasonable benefits, and nominal fees, or a combination thereof.

Background

In 1966, Congress amended the FLSA to cover employees of certain publicly-operated institutions, principally schools and hospitals. The constitutionality of this extension of coverage under the Act was upheld by the U.S. Supreme Court in Maryland v. Wirtz, 392 U.S. 183 (1968). The Education Amendments of 1972 further extended FLSA coverage to employees of public preschools. Virtually all of the remaining State and local government employees who were not covered as a result of the 1966 and 1972 FLSA Amendments were brought under the coverage of the Act by the 1974 Amendments. These Amendments were challenged as unconstitutional and in National League of Cities v. Usery (NLOC), 426 U.S. 833 (1976), the Supreme Court overruled its earlier decision in Maryland v. Wirtz. In NLOC, the Court held that the minimum wage and overtime pay provisions of the FLSA could not be applied constitutionally to State and local government employees who are engaged in traditional governmental activities. However, the Court also held that these provisions could be applied constitutionally to public agency employees engaged in non-traditional activities.

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In the Garcia case, the issue before the courts was whether the FLSA was unconstitutional as applied to employees of public mass transit systems. On February 19, 1985, the U.S. Supreme Court issued its decision overruling NLOC in its entirety, concluding that the "traditional governmental function" test is unworkable and "inconsistent with established principles of federalism."

As a result of this decision, State and local government employees previously determined to be engaged in traditional governmental functions, and thus excluded from the minimum wage and overtime pay provisions of the FLSA, became subject to these provisions.

Discussion of Major Comments

A total of 165 comments were received on the proposed regulations, including many from organizations with national constituencies. Among these were comments from (listed in the order received):

National Public Employer Labor Relations Association (NPELRA).

National Association of Towns and Townships (NATT).

Public Employee Department, AFL-CIO (AFL-CIO).

American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME).

National Education Association (NEA).



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National Volunteer Fire Council (NVFC).

International Association of Fire Fighters (IAFF).

International Association of Fire Chiefs (IAFC).

National Association of Counties (NAC).

National Conference of State Legislatures (NCSL).

Fraternal Order of Police (FOP).

National League of Cities (NLOC).

International Personnel Management Association (IPMA).

In addition to the substantive comments discussed below, many commenters submitted minor editorial suggestions some of which have been adopted and some of which have not been adopted. Also, a number of commenters requested that the regulations be revised to explain the application of the FLSA to specific hypothetical situations (or ask for specific opinions on fact situations), concerning, for example, hours worked issues. In the Department's view, the regulations, which are intended to have broad, general application, cannot attempt to address such specific issues which, in any event, would require a full examination of all the facts and circumstances in specific cases. Therefore, such comments have not been addressed herein.

* * *

*Appendix J*

Section 7(o) Compensatory Time and Compensatory Time Off.

Section 553.20 Introduction.

The NLOC stated that the specific reference to the 40-hour workweek overtime standard in section 7(a) of the Act should be eliminated since compensatory time could be provided to employees who work overtime under other statutory requirements, such as section 7(k). Also, the NLOC recommended that the reference to an "element of flexibility" for the employer and an "element of choice" for employees should be eliminated since collective bargaining requirements could eliminate any elements of flexibility or choice.

The Department agrees that the language in the proposed rule concerning the application of compensatory time could be misleading and has modified the section to note that compensatory time may be provided in lieu of monetary overtime compensation that otherwise would be required by any of the applicable provisions of section 7 of the FLSA. With respect to the second comment, the legislative history indicates that the intent of section 7(o) of the FLSA was "to provide flexibility to State and local government employers and an element of choice to their employees regarding compensation for statutory overtime hours worked by covered employees" (H. Rep., p. 19). Accordingly, this suggested revision has not been made. However, to clarify that employee representatives often exercise the employees' element of choice by negotiating the terms of the agreement or understanding, the phrase "or the representatives of their employees" has been added to the second sentence of this section between the words "employees" and "regarding."



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Section 553.23 Agreement or understanding prior to performance of work.

The NLOC commented that language should be added to paragraph (a)(1) of this section to clarify that no agreement or understanding on compensatory time is required with respect to employees hired prior to April 15, 1986, if the public agency had a regular practice of granting compensatory time in lieu of overtime pay prior to that date. The Department agrees that clarifying language is needed. However, the statute provides that this exception only applies to employees not covered by ". . . a collective bargaining agreement (CBA), memorandum of understanding, or any other agreement between the public agency and representatives of such employees". Both the House and Senate reports also plainly state that the exception for a "prior practice" in lieu of an agreement or understanding was intended to be applicable only to employees who do not have a representative. (See H. Rep., p. 20 and Senate Report No. 99-159, p. 11 (hereinafter cited as S. Rep.).) Accordingly, paragraph (a)(1) of the regulations has been modified to add clarifying language.

The NLOC also suggested replacing the words "in conformance" with the word "consistent" in the sentence in § 553.23(b)(1): "Any agreement must be in conformance with the provisions of section 7(o) of the Act." The Department agrees that the words "in conformance" could be misconstrued to mean that the agreement could not provide standards for use of compensatory time more beneficial than those in section 7(o) of the Act (such as double-time pay, a cap lower than 480 hours for employees engaged in public safety activities, etc.). Furthermore, the NLOC also suggested elsewhere that the regulations make clear that provisions contained in agreements

which "conflict" with section 7(o) are superseded by the Act's requirements.

Both of these comments have merit and the Department has revised the language of the section to address these issues.

The Fraternal Order of Police (FOP) recommended that the proposed rule be revised to state that an existing practice or CBA regarding compensatory time will continue as an agreement or understanding for purposes of section 7(o) of the FLSA even if the parties are operating under the terms of an expired agreement, are in negotiations for a successor agreement, or are engaged in dispute resolution.

The Department has no legal authority under the statutory language or legislative history of the 1985 Amendments to issue rules concerning collective bargaining negotiations between a public agency and their employees regarding compensatory time, except those needed to assure that any such agreements are consistent with the provisions of section 7(o) of the Act. The outcome in such cases is a matter between the parties and is dependent upon the terms of the expiring CBA, any other formal agreements or understandings between the parties, and applicable labor-management relations laws.

Various commenters, particularly representatives of cities, expressed concern with the statement in § 553.23(b)(1), "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." Two commenters objected to this provision because they believed that it would require a collective bargaining obligation between a public employer and its employees, when no such bargaining obligation currently exists



under State or Federal law. They felt that in those jurisdictions where there is no requirement that employers meet and deal with employee representatives, employee organizations could attempt to establish a collective bargaining obligation via these regulations. They were also concerned that this subsection is not clear about the employer's obligation to "recognize" any representative, that conceivably an employer could find itself dealing with a different representative for each employee. They believed that § 553.23(b)(1) should operate only where collective bargaining obligations are provided for by State law.

A city government suggested that where employees are not represented by a collective bargaining agent, the agreement for compensatory time should be made only with the public agency's authorized representative.

Another commenter suggested that, since most cities and towns have not recognized a union or other employee association, subsection (b) be revised to clarify that the agency must only reach agreement with "recognized" units.

The State of Missouri expressed concern that where employee representatives have no authority to bargain enforceable agreements, the proposal accords greater legal status to employee representatives than is possible under State law. They suggested that "recognized representative" mean an organization designated by the employees under a State's comprehensive collective bargaining statute, but not to include organizations covered by "meet and confer" statutes.

The Department believes that the proposed rule accurately reflects the statutory requirement that a CBA, memorandum of understanding or other agreement be reached between the public

agency and the representative of the employees where the employees have designated a representative. Where the employees do not have a representative, the agreement must be between the employer and the individual employees. The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section 7(o) shall be determined in accordance with State or local law and practices.

In addition, to clarify the fact that the representative of the employees need not be a formal or recognized collective bargaining agent, the Department has modified § 553.23(c)(1), as suggested by the National Education Association (NEA), to add the words "or otherwise designated" between the words "recognized" and "representative" since collective bargaining is not a necessary condition for establishing an agreement between an employer and an employee representative.

The FOP and the Public Employee Department, AFL-CIO (AFL-CIO) disagreed with the statement in the proposal that where there is no employee representative, an agreement or understanding may be evidenced by a notice to the employee that compensatory time will be given and that acceptance will be presumed when the employee fails to object. These commenters indicated that this language in the regulation would permit a unilateral agreement since, because of job realities, an employee is unlikely to object. They stated that if a notice is deemed to meet the statutory requirement of an agreement, more restrictions should be placed on the employer.

The House Report states on page 20 that "The use of compensatory time in lieu of cash must be pursuant to some



form of agreement or understanding between employer and employee, or notice to the employee, prior to the performance of the work." (Emphasis added.) Neither the statute nor legislative history provides any basis for the Department to impose restrictions on the use of a notice to evidence that there is an agreement or understanding.

As discussed above, proposed § 553.23(c) provided that an agreement or understanding may be evidenced by a notice to the employee provided, among other requirements, that the employee accept the compensatory time in lieu of overtime pay after being so notified. The NLOC correctly pointed out that employers should not have to wait for employees to work overtime in order to be certain that the "agreement" requirement has been met. The Department agrees and, in view of the fact that no such requirement is in the statutory language or legislative history of the Amendments, has deleted this requirement.

The NEA argued that in no event should the agreement or understanding to accept compensatory time off in lieu of cash overtime compensation be made a condition of original employment as proposed in § 553.23(c)(1). They suggested that the proposal does not reflect the statutory intent that employees must agree to accept compensatory time off in lieu of overtime pay "freely and without coercion." They stated that the only freedom of choice the potential employee would have in such a case would be the freedom not to accept the position. The NEA argued that the statute gives the employees the right to increase their bargaining power by designating representatives to enter into agreements with employers on the issue of compensatory time. They further argued that potential employees would never have the opportunity to exercise such

power if they were required to accept compensatory time as "a condition of employment." Therefore, the NEA proposed that all references to agreements or understandings to accept compensatory time as a "condition of employment" be deleted from the proposed regulations.

Both the Senate and House Reports clearly provide that the agreement or understanding to provide compensatory time off in lieu of cash overtime compensation may be made a condition of original employment. The Senate Report states: "The agreement or understanding to provide time off as compensation for overtime may take the form of an express condition of employment, so long as (i) the employee knowingly and voluntarily agrees to it as a condition of employment, and (ii) the employee is informed that the comp time received may be preserved, used, or cashed out consistent with the provisions of this new subsection." (i.e., section 7(o).) (S. Rep., p. 11). The House Report on page 20 provides similar language. Since the language in § 553.23(c) tracks the legislative history on this issue, no change has been made to incorporate this comment.

Finally, the NLOC suggested that the requirement that the employee "knowingly and voluntarily" agree to compensatory time as a condition of employment in this subsection be deleted. However, the Senate Report on page 11 specifically contains this requirement. The House Report also contains similar language on page 20. Accordingly, this change cannot be made.

* * *





Section 553.25 Conditions for use of compensatory time ("reasonable period", "unduly disrupt").

Many commenters, including the FOP, the National Association of Towns and Townships (NATT) and the NLOC, stated that the definition of "reasonable period" was unclear and needed to be made more specific. It was suggested by the NLOC that employers be permitted to establish a general rule and not be required to examine each request for compensatory time off on a case by case basis. The FOP suggested that outside time limits could be established within which compensatory time must be granted. Others suggested that the scheduling of compensatory time should be solely at the employer's discretion. However, some commenters, including the AFL-CIO, argued that the intent of the Act was to give employees the right to receive compensatory time and not the employer the right to grant.

The legislative history makes it clear that an employee has the right to use some or all of accrued compensatory time within a reasonable time after requesting such use, provided that it does not unduly disrupt the employer's operations (H. Rep., p. 23 and S. Rep., p. 12). The Department believes the use of the term "reasonable" was intended to accommodate varying work practices based on the facts and circumstances of each case. Therefore, it is necessary that each situation be examined on a case by case basis to make a determination of "reasonable period" since no arbitrary rule could be applied in every situation. The proposed revision has, therefore, not been adopted. However, the legislative history does indicate that an employee should not be coerced to accept more compensatory time in lieu of overtime pay than an employer can realistically and in good faith expect to be able to grant to that employee

within a reasonable period of his or her making a request for use of such time. The rule has been modified to make it clear that compensatory time is not envisioned as a means to avoid overtime compensation (H. Rep., p. 23) and that an employee has the right to be able to use the compensatory time earned. However, no specific time frame has been established for use of compensatory time.

With regard to the term "unduly disrupt", many commenters, including the International Association of Fire Chiefs (IAFC), suggested that the term be defined to state that it would be unduly disruptive to grant compensatory time off any time granting such leave to an employee would require another employee to work overtime to perform the services. Also, the NLOC and others disagreed with the statement in this section that "mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off."

The legislative history to the 1985 Amendments specifically clarifies that the term "unduly disrupt" means something more than mere inconvenience (H. Rep., p. 23 and S. Rep., p. 12). The Reports provide an example that a request by a snow plow operator in Vermont or Maine to use compensatory time in February would probably be unduly disruptive even if the request were made well in advance. On the other hand, the same request by the same employee for compensatory time in June probably would not be unduly disruptive. As stated in the proposed rule, for an agency to refuse an employee's request for compensatory time off, it must be clear that the granting of such compensatory time off must result in an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity. The Department



recognizes that situations may arise in which overtime may be required of one employee to permit another employee to use compensatory time off. However, such a situation, in and of itself, would not be sufficient for an employer to claim that it is unduly disruptive. In addition, it should be noted that the legislative history (H. Rep., p. 23) states that for those employees where the problem of disruption of services to the public is persistent, compensatory time should not be the preferred method of compensation for overtime work. The Department believes the proposed rule accurately mirrors the legislative intent. Therefore, the suggested revisions are not adopted.

The NLOC suggested deleting § 553.25(b)(2) in the proposal. This subsection states that where the agreement or understanding between the employer and the employee (or the representative of the employee) contains the conditions under which an employee can take compensatory time off, such agreement or understanding will govern the meaning of "reasonable period". The NLOC pointed out that neither the statute nor legislative history of the 1985 Amendments provides for such a rule. The Department, however, believes that some parties may choose to include in their agreement or understanding the conditions or terms regarding the taking of compensatory time off. No useful purpose would be served, in the Department's view, by providing for some further review under the FLSA of the appropriateness of the agreed upon terms. Accordingly, the suggested revision has not been adopted.

Section 553.27 Payments for unused compensatory time.

Various parties, including the National Association of Counties (NAC), commented on the statutory requirement that

at the time of termination an employee must be paid for unused compensatory time based on either the average regular rate received during the last 3 years of employment or the final regular rate received, whichever is higher. Of particular concern was the 3-year period which must be used in making such a determination. It was suggested that only the 3 years prospective to April 15, 1986, be used, since States and local governments not covered by the FLSA prior to that date would be unable to reconstruct payroll records to determine a 3-year average regular rate. Also, it was suggested that the last 3 years of employment be defined as the last 3 years of continuous employment since some employees may have worked a total of 3 years for a public agency, but over a longer period of time. Thus, the rule would require public agencies to maintain payroll records for an indeterminate period of time.

The Department recognizes that State and local government agencies may not have some or all of the records for the period prior to April 15, 1986, needed to calculate the 3-year average regular rate for their terminating employees, and that this lack of 3 years of records may continue to exist for some time, in some cases until April 15, 1989. The Department has no authority to waive this statutory requirement, and thus no changes have been made in this section to incorporate this comment. However, in order to provide for the 3-year transition period following April 15, 1986, the Department has adopted the following enforcement policy with respect to this matter. Where there are no payroll records for the period prior to April 15, 1986 (or where the available records are inadequate to permit the calculation of the regular rate as defined in FLSA section 7(e)), the final regular rate, or the average regular rate in the period between April 15, 1986, and the date of termination, whichever is higher, should be used to calculate



the payment for accrued compensatory time. However, where some or all of the records of employment prior to April 15, 1986, are adequate, including any accurate records maintained by the employee, such records should also be utilized in calculating the employee's average regular rate, even if they do not cover the entire 3-year period prior to termination of employment.

The Department agrees that a literal reading of the statutory requirement that the average regular rate received during the final 3 years of employment could require public agencies to retain payroll records indefinitely in order to provide for circumstances in which an employee's final 3 years of employment are not consecutive. Nothing in the statutory language or legislative history of the 1985 Amendments would suggest that the Congress intended to place such a burden on public agencies. It is the Department's position that the phrase "last 3 years of employment" means the 3-year period immediately prior to termination and has revised this section of the regulations accordingly. Thus, where an employee's last 3 years of employment are not continuous because of a break in service, assuming that the initial separation was intended to be permanent and any accrued compensatory time earned after April 14, 1986, was cashed out at the time of the initial separation, the subsequent period of employment would be treated as a new employment. If the final period of employment is less than 3 years, the average regular rate would be calculated based on the rate(s) in effect during such period.

* * *

*Appendix J*

II. Methodology for Estimating the Fiscal Impact of the 1985 FLSA Amendments

Cost Impact of Section 7(o)

Section 7(o) of the FLSA Amendments provided some relief from the imposition of the overtime provisions of the FLSA by permitting, within defined limits, compensatory time off in lieu of monetary payment. Such compensatory time is earned at a rate of not less than one and one-half hours for each hour of overtime. It is this provision which requires a change in the methodologies followed in estimating the impact for the Garcia decision.

Section 7(o) permits covered and nonexempt employees engaged in public safety, emergency response, and seasonal activities to accrue 480 hours of compensatory time. All other covered and nonexempt employees can accrue up to 240 hours of compensatory time. This provides State and local governments and individual employees some flexibility which would not otherwise be available as a result of the Garcia decision. The cost effect of this provision will depend upon the necessity for governments to provide a given service. For example, certain services such as police protection must be maintained consistently, and as a result, the hours of work committed to that activity cannot be reduced or postponed, and additional people with necessary skills are not immediately available. In other words, the demand for and supply of people providing that service are inelastic. Another factor which must be taken into account is the propensity of employees to "bank" or save their compensatory time earned. To the extent that employees "bank" their compensatory time, there will be a delay in the cost impact of the FLSA Amendments.

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*Appendix J*

For reasons set forth above, 29 CFR Part 553 is revised as set forth below.

Signed at Washington, DC, on this 12th day of January, 1987.

William E. Brock,

Secretary of Labor.

Susan R. Meisinger,

Deputy Under Secretary for Employment Standards.

Paula V. Smith,

Administrator, Wage and Hour Division.

* * *

51 FR 25710 printed in FULL format.

DEPARTMENT OF LABOR
Wage and Hour Division
AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

29 CFR Part 553
Application of the Fair Labor Standards Act to Employees of State and Local Governments

51 FR 25710

July 16, 1986

ACTION: Publication of Regulatory Impact Analysis; Request for Comment.

SUMMARY: This document provides the Department's regulatory impact analysis for proposed regulations concerning the application of the Fair Labor Standards Act to employees of State and local governments.

DATE: Comments are due on or before July 31, 1986.

ADDRESS: Submit comments to Paula V. Smith, Administrator, Wage and Hour Division, U.S. Department of Labor, room S-3502, 200 Constitution Avenue, NW., Washington, DC, 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card.

FOR FURTHER INFORMATION CONTACT: Herbert J. Cohen, Deputy Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW., Washington, DC, 20210, (202) 523-8305. This is not a toll free number.

TEXT: SUPPLEMENTARY INFORMATION: On April 18, 1986, proposed Regulations, 29 CFR Part 553, Application of the Fair Labor Standards Act to Employees of State and Local Governments, were published in the Federal Register (51 FR 13402). Interested parties were afforded the opportunity to submit comments within 45 days after publication. The proposal also included certain preliminary information on costs associated with the Fair Labor Standards Act (FLSA) coverage of State and local governments. In addition, commenters were asked to submit any available data on the economic impact of





the 1985 FLSA Amendments. Subsequent to the publication of the proposed regulations, it was determined that the Department could provide certain additional information on the cost impact of the above proposal. Accordingly, this document provides the Department's preliminary regulatory impact analysis under Executive Order 12291.

Background

After the decision by the U.S. Supreme Court in Garcia v. San Antonio Metropolitan Transit Authority et al. (Garcia), 105 S. Ct. 1005 (February 19, 1985), holding that the FLSA may constitutionally be applied to State and local governments, representatives of many State and local government employer and employee organizations identified several areas in which they believed they would be adversely affected by application of the FLSA. On November 13, 1985, the Fair Labor Standards Amendments of 1985 were enacted into law. These amendments changed certain provisions of the FLSA as they relate to employees of State and local governments.

The 1985 Amendments responded to many of these concerns by including special provisions in the FLSA which apply only to employees of State and local governments.

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II. Methodology for Estimating the Fiscal Impact of the 1985 FLSA Amendments

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Section 7(o) permits covered and nonexempt employees engaged in public safety, emergency response, and seasonal activities to accrue 480 hours of compensator time. All other covered and nonexempt employees can accrue up to 240 hours of compensatory time. This provides State and local governments and individual employees some flexibility which would not otherwise be available as a result of the Garcia decision. The cost effect of this provision will depend upon the necessity for governments to provide a given service. For example, certain services such as police protection must be maintained consistently, and as a result, the hours of work committed to that activity cannot be reduced or postponed, and additional people with necessary skills are not immediately available. In other words, the demand for and supply of people providing that service are inelastic. Another factor which must be taken into account is the propensity of employees to "bank" or save their compensatory time earned. To the extent that employees "bank" their compensatory time, there will be a delay in the cost impact of the FLSA Amendments.

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